Supreme Court, U.S.
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No. 10-1040

IN THE

Supreme Court of the United States

JOHN PETRUCELLI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Holloway recognized the evil of representing clients with conflicting interests "is in what the advocate finds himself compelled to *refrain* from doing." Petitioner's defense counsel never disclosed their representation of unindicted co-conspirators whose out of court statements counsel knew the government would use to establish its burden of proof at trial. *Did defense counsels' undisclosed representation of the unindicted co-conspirators violate Petitioner's Sixth Amendment right to conflict-free counsel?*

Defense counsel's cross-examination of a cooperating witness educed irrelevant damming testimony that counsel had previously moved to exclude, which established the testimony for future criminal cases where counsel represented other organized crime clients where the testimony was particularly relevant. *Did defense counsel's cross-examination of the cooperating witness violate Petitioner's Sixth Amendment right to conflict-free counsel?*

Under *Kyles*, evidence undermining the thoroughness or good faith of a police investigation is favorable and material. The government withheld evidence that would have enabled Petitioner to discredit the thoroughness and integrity of its investigation regarding its key cooperating witness at trial. Based on the government claim that the evidence was unreliable, the lower courts did not consider this evidence favorable or material. *Did the lower court's failure to consider this evidence favorable and material based on the government's claim that the evidence was* unreliable

violate Petitioner's Due Process rights under Brady and Kyles?

Whether the lower courts denial of an evidentry hearing and a certificate of appealibity regarding Brady and Sixth Amendment violations warrant an exercise of the Court's supervisory power.

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PETITION FOR WRIT OF CERTIORARI

Petitioner John Petrucelli respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The District Court's opinion denying a writ of habeas corpus, an evidentiary hearing and a Certificate of Appealability ("COA") is reproduced in the Appendix to this petition[1]. App. 5a. *Petrucelli v. United States*, 2009 U.S. Dist. LEXIS 116605 (SDNY 2009). The decision of the Court of Appeals for the Second Circuit denying Petitioner's motion for a COA is a one page unreported order without analysis. App. 3a. The Second Circuit denied Petitioner's motion for reconsideration with suggestion for reconsideration *en banc* in a one page unreported order. App. 1a.

SUPREME COURT JURISDICTION

The Second Circuit denied Petitioner's motion for reconsideration with suggestion for reconsideration *en banc* on November 23, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Amendment V to the Constitution of the United States provides, in relevant part, "No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a

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[1] Numbers followed by "a" refer to pages of the Appendix to this petition.

Grand Jury . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."

Amendment VI to the Constitution of the United States provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defense."

Title 28, United States Code section 2253:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Title 28, United States Code section 2255, provides, in relevant part:

(b) Unless the motion and the files and records . . . conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon determine the issues and make findings of fact and conclusions of law with respect thereto . . . .

Fed. R. Evid. 403, provides, in relevant part that:

[R]elevant, evidence may be excluded if its probative value is . . . outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . or needless presentation of cumulative evidence.

Fed. R. Evid. 404(b), provides, in relevant part that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

Fed. R. Evid. 801(d)(2)(E), provides in relevant part that:

Admission by party-opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority.

DISTRICT COURT JURISDICTION

The United States District Court exercised jurisdiction under 28 U.S.C. § 2255.

STATEMENT OF THE CASE

This case concerns the secrets that deprived Petitioner of fundamental fairness and effective assistance of counsel at trial. First, defense counsel never disclosed their representations of five unindicted co-conspirators whose out of court

statements counsel knew the government would use to establish its burden of proof at trial. Second, defense counsel's cross-examination of a cooperating witness revealed they had concealed their representations of other organized crime clients, which included a clandestine legal relationship with a Luchese Crime Family Acting Boss. Third, the government withheld evidence that would have enabled Petitioner to discredit the thoroughness and integrity of its investigation regarding the credibility of its key cooperating witness, Darrin Mazzarella.

The District Court never considered the *Brady* evidence was favorable and material based upon the government's claim that the evidence was unreliable: In concluding there was no conflict of interest, the District Court never considered that defense counsels' co-existing duties of loyalty and confidentiality to Petitioner and the unindicted co-conspirators prevented them from presenting a full defense on the Petitioner's behalf, because do so may have placed the unindicted co-conspirators in harms way.

Thereafter, relying on *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the Second Circuit panel order concluded, without analysis, that Petitioner did not make "a substantial showing of the denial of a constitutional right" regarding the *Brady* and Sixth Amendment claims. App. 3a. Its order presents an analytical problem because the reasons supporting its conclusion are unknown. What is clear, however, is that the legal conclusions in the District Court's opinion, dismissing Petitioner's Section 2255 motion, are untenable. Accordingly, any reliance by the panel on the District Court's opinion was misplaced.

Procedural History

A jury convicted the Petitioner of murder in aid of racketeering activity following a 2002 trial in the United States District Court for the Southern District of New York. He was later sentenced to life in prison. App. 10a. The District Court detailed the procedural history of this case on direct appeal and in recent habeas proceedings in its opinion. App. 8a-10a. On December 15, 2009, the District Court dismissed Petitioner's application for a writ of habeas corpus before conducting an evidentry hearing and denied a COA. App. 33a. On August 3, 2010, the Court of Appeals for the Second Circuit denied Petitioner's motion for a COA. App. 1a-2a. The Second Circuit denied Petitioner's motion for reconsideration with suggestion for reconsideration *en banc* on November 23, 2010. App. 3a-4a.

Pre-Trial Proceedings

Seven years after Paul Cicero was stabbed to death, in the Bronx, New York, the government charged Petitioner with murder in aid of racketeering activity, in violation of 18 U.S.C. § 1959(a)(1). App. 8a, 33a-39a. The indictment charged Petitioner with murdering Cicero to maintain and increase his position in a racketeering enterprise known as the "Tanglewood Boys." App. 38a. Further, that members of the Tanglewood Boys committed crimes in the Bronx and Westchester County, New York, including murder, robbery, loansharking, and gambling, and that the Tanglewood Boys enterprise and Luchese Crime Family of La Cosa Nostra were connected; its members were sons of "made" members of the

Luchese Crime Family; and were "on record" with the Luchese Crime Family through their fathers. Moreover, that the enterprise contributed illegal proceeds to the Luchese Crime Family in exchange for protection, with the prospect of gaining entrance into the Luchese Crime Family for themselves. App. 33a-38a. The Luchese Crime Family was not charged as a racketeering enterprise in the indictment.

On February 1, 2002 Petitioner pled not guilty to the charges in the indictment and the court remanded him to the Federal Bureau of Prisons where he was confined in Administrative Detention, facing a possible death sentence.[2]

Attorneys Breitbart and White (hereinafter "Defense counsel") represented petitioner at trial. App. 18a. Defense counsel moved to strike any reference in the indictment to the "Luchese Organized Crime Family of La Cosa Nostra" because the references would inflame the jury with extremely prejudicial organized crime evidence. App. 57a. Moreover, since the racketeering enterprise charged in the indictment was the "Tanglewood Boys" references to the "Luchese Organized Crime Family of La Cosa Nostra" were irrelevant. Defense counsel made several motions for disclosure of *Brady* materials and for court ordered production and inspection of *Brady* materials, which the government consistently opposed. App. 8a. The government claimed to be unaware of any *Brady* material, that there was no need for court ordered production and inspection, and its good

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[2] On September 10, 2002, the government announced that it would not seek the death penalty, leaving Petitioner to face mandatory life imprisonment if convicted.

faith representations regarding its *Brady* obligations made court ordered compliance unnecessary. App. 8a.

On October 4, 2004, the government moved to disqualify defense counsel claiming a conflict of interest existed between them and cooperating witness, Joseph Defede. Defede was a convicted Luchese Family Acting Boss who became a cooperating witness for the government by 2002. The court denied the government's application to disqualify defense counsel. During that hearing, however, neither defense counsel advised Petitioner or the court they were presently representing Genovese Family Boss, Liborio Bellomo, Luchese Family Acting Boss, Steven Crea and Anthony DiSimone. And that defense counsel recently represented Alfred and Anthony Santorelli in both state and federal prosecutions involving the "Tanglewood Boys." All of defense counsels' clients were unindicted co-conspirators whose out-of-court statements they knew the government would use to establish its burden of proof at trial. Even so, defense counsel did not interview or subpoena any of the unindicted co-conspirators for purposes of rebutting the out-of-court statements they knew the government would be attributing to them through the testimony of cooperating witnesses, Darrin Mazzarella[3] and Joseph Defede.

On October 15, 2002, defense counsel moved *in limine* to preclude co-conspirators statements, evidence of other crimes, wrongs, or acts, and background and enterprise evidence under Rules 801

[3] In 1997, Darrin Mazzarella began cooperating with the government after being indicted for the murder of Louis Balancio by a grand jury in Westchester County, New York.

(d)(2)(E), 404 (b) and 403 of the Federal Rules of Evidence. On October 21, 2002, the court denied defense counsel's pre-trial motion to strike references in the indictment to the "Luchese Organized Crime Family of La Cosa Nostra" and all motions concerning *Brady* material. App. 57a-58a. Regarding defense motions *in limine*, the court reserved its decision on co-conspirator testimony under Rule 801(d)(2)(E) of the Federal Rules of Evidence and precluded some, but admitted most of the uncharged crimes, background and enterprise evidence.

The Trial

The government's trial theory was that on June 20, 1995, Petitioner murdered Paul Cicero to avenge the shooting of Tanglewood Boys leader Darrin Mazzarella by Genovese Crime Family associate Michael Zanfardino, which ignited a dispute between the Luchese and Genovese Crime Families. App. 6a-8a. The cornerstone of its case was Mazzarella's testimony establishing the racketeering enterprise, the pattern of racketeering activity, the Tanglewood Boys and Luchese Crime Family nexus, Anthony Santorelli's criminal involvement with the Tanglewood Boys, the dispute between the Luchese and Genovese Crime Families, meetings between Defede and Liborio Bellomo to resolve the dispute, and corroboration of Defede's testimony. During that testimony, Mazzarella placed the unindicted co-conspirators out-of-court statements before the jury. App. 8a-9a. According to Mazzarella:

- On June 21, 1995, the day after the shooting and stabbing, Steven Crea, the Under-

boss of the Luchese Family, summoned Petitioner to a meeting. Crea explained that the Genovese Family had contacted him to prevent the Tanglewood Boys from taking revenge against Zanfardino. Petrucelli informed Crea that he had stabbed Cicero in response to Mazzarella's shooting. App. 7a.

- Days later, Acting Boss of the Genovese Family, Liborio Bellomo, requested a meeting with Joseph Defede, the Acting Boss of the Luchese Family, to discuss the circumstances surrounding the shooting and stabbing. Bellomo asked Defede to ensure that the Tanglewood Boys not to pursue Zanfardino and argued that the Cicero murder constituted sufficient revenge against the Genovese Family for Mazzarella's shooting. Defede granted Bellomo's request. App. 7a.
- In early 1996, after Mazzarella had recovered from his gunshot wounds, he met with Defede to discuss his desire to retaliate against Zanfardino. Defede explained that revenge would be unjustified because of Cicero's murder and instructed Mazzarella not to exact retribution. Several days later, at Defede's request, Mazzarella and Zanfardino met and formally called a truce. App. 7a-8a.

Petitioner had never been convicted of any crime, charged or otherwise, which Mazzarella had attributed to him. The government struggled to corroborate Mazzarella's testimony with testi-

mony from other witnesses that crimes had been committed but that testimony did not directly connect petitioner to the crimes. In only one instance was objective evidence offered that Petitioner was remotely involved in the crimes Mazzarella attributed to him involving the enterprise and pattern of racketeering activity.

Conversely, Mazzarella admitted to years of violent criminal activity resulting in multiple convictions. He acknowledged the Westchester County District Attorney ("WCDA") charged him with the murder of Louis Balancio because he held Balancio down while Balancio was stabbed. On cross-examination, he "adamantly denied any involvement in the Balancio murder." App. 31a.

Defede's testimony also placed the unindicted co-conspirators out-of-court statements before the jury. The District Court permitted Defede to testify as follows:

- Santorelli's statements apprising him of the Mazzarella shooting and Cicero homicide. App. 61a-62a.
- Statements made by Crea, Santorelli and Bellomo to resolve the dispute between the Luchese and Genovese Crime Families. App. 63a-65a.
- His conversation with Alfred Santorelli warning him not to retaliate against Zandafino for shooting Mazzarella. App. 65a-66a.

Acting under F.R.Evid. 801(d)(2)(E), the court overruled defense counsel's objections to this line of questioning. Eventually the court allowed

defense counsel a continuing objection. App. 60a-61a.

Contrary to the pre-trial motion to exclude references in the indictment to La Cosa Nostra and the Luchese Crime Family, defense counsel launched into two-day cross examination of Defede highlighting La Cosa Nostra, the Luchese Crime Family, and scores of gruesome murders committed by members of other New York Mafia crime families, all irrelevant to Petitioner's case. Remarkably, defense counsel elicited over 60 names of organized crime members riveting the jury's attention on the very inflammatory evidence they had moved to exclude. Thereafter, the court admitted previously excluded Luchese Crime Family evidence. When defense counsel objected:

> That's why we moved to strike the Luchese crime family allegations from the indictment. Now it's coming home to roust. App. 57a.

The court stated:

> And I repeat, we heard hours and hours of cross-examination about relationships of people who had no connection with the events, particularly, but, obviously, there was the cross-examiner, . . . Breitbart. App. 57a.

Habeas Proceedings in the District Court

Petitioner's Section 2255 motion made a substantial showing that his constitutional rights to effective assistance of counsel and due process of law were violated. His moving papers, affidavit, other factual submissions showed defense counsel "actively represented conflicting interests" and that the "actual conflict of interest adversely

affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). Actual conflicts of interest resulted from defense counsels' undisclosed representations of five unindicted co-conspirators whose out of court statements counsel knew the government would use to establish its burden of proof at trial. In short, Petitioner demonstrated "some plausible alternative defense strategy or tactic" that "was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Winkler v. Keane*, 7 F.3d 304, 309 (2nd Cir. 1993).

Additionally, Petitioner showed that defense counsels' past, present and future representation of other organized crime clients, including a clandestine legal relationship with convicted Luchese Acting Boss Louis Daidone, accounted for defense counsels' exceptionally destructive cross-examination of Defede. The real purpose of Defede's cross-examination served past, present, and future clients and created a record of Defede's anticipated testimony in Daidone's future trial.

Although the government's January 2007 answer to Petitioner's motion claimed defense counsels' other representations were not active at or near the time of Petitioner's trial the District Court found otherwise. App. 18a-20a. Defense counsel White was representing Steven Crea and Anthony DiSimone at the time of trial and had recently represented Anthony and Alfred Santorelli. Defense counsel Breitbart was representing Liborio Bellomo at the time of trial, had recently represented Christopher Furnari and later represented Bonanno Family Boss, Joseph Massino.

While the District Court indicated defense counsel never represented Daidone, (App. 20a) defense counsel inexplicably cross-examined Defede about the murders of Bruno Facciola, Thomas Gilmore, Larry Taylor, and Alfred Visconti. Those murders were irrelevant to Petitioner's case, but were relevant in the government's later case against Daidone. The government's answer acknowledged defense counsel asked Defede 17 questions pertaining to Gilmore's murder and more questions relating to Facciola's murder. After Petitioner's trial, Defede testified at Daidone's trial where his testimony echoed that from Petitioner's trial detailing Daidone's involvement in the murders. Those facts show defense counsel's cross-examination of Defede regarding the murders benefited Daidone not Petitioner and suggest a hidden legal relationship between defense counsel and Daidone. The District Court recognized defense counsel had never filed a notice of appearance in Libero Bellomo's case. App. 20a. However, it also found defense counsel attended joint defense meetings, made court appearances, and was listed as counsel on Bellomo's numerous pre-trial motions. App. 20a. Thus, the absence of evidence indicating an official attorney-client relationship between defense counsel and Daidone is not surprising. The *questions* speak for themselves.

On April 25, 2007, the government provided counsel with copies of transcripts that brought into being Petitioner's claims for violations of *Brady* and its progeny. App. 41a-57a. The transcripts evinced two secretly recorded telephone conversations made on December 18, 1997, between Mark Pomerantz, then Chief of the Crim-

inal Division for the United States Attorney's Office ("SDNY"), and Jeanine Pirro, then District Attorney of Westchester County ("WCDA"). App. 40a. The transcripts contained information of a 1997 debriefing of an FBI informant which thoroughly discredited Mazzarella's trial testimony concerning the Balancio homicide. According to the transcripts an informant told the FBI debriefing agent that he had a conversation with Mazzarella where Mazzarella admitted to participating in Balancio's homicide:

> **MP:** We found, we debriefed a bureau informant within the last 12 hours, but certainly the last 24 hours who told us that a year and a half ago, he had a conversation with Darren Mazzarella in which Darren admitted holding down Balancio while Nick stabbed him. App. 50a.

Although the District Court noted "Pomerantz . . . repeatedly expressed reservations about the veracity of the information," Pomerantz also stated:

> **MP:** Now I'm told this guy is reliable but I don't know anything about him yet. Our agents who have been working the Tanglewood case, Calore, etc. have not spoken to the guy. But I just reached an agent who was there when he was debriefed about this other matter and I'm told that, you know, he sounded credible. App. 50a.

Pirro, her staff and Pomerantz expressed dire concerns:

> **JFP:** Oh God. App. 42a.

> **MP:** I know, it's the last thing I wanted to hear and frankly I, I, was hesitant even about raising it, but God forbid, it turns out to be accurate after everything that's gone under the bridge. App. 42a.
>
> **FTD:** . . . now in light of what you just said I don't think we should go into anything and commit ourselvesto anything until that witness that talked to yourfolks can be talked to. Otherwise we'll all have egg on our face. App. 47a.

Regarding Mazzarella's credibility and cooperation agreement:

> **SAB:** Mark, if this is true, then obviously Darren and Nick have violated their cooperation agreement. App. 44a.

The transcripts show the WCDA was ready to announce a press conference on December 19, 1997, that she was dismissing the indictment charging Mazzarella with Balancio's murder and indicting Anthony DiSimone instead. But, after learning this information Pirro's Chief Assistant, Clement Patti advised:

> **CSP:** I mean I would be, recommending to Jeanine not to announce an indictment against DiSimone at this point if we have another witness because that throws Darren's credibility and Nick's credibility. App. 44a.

Acting on Pomerantz's information, the WCDA cancelled the press conference scheduled for the next day and waited "two months" before dismissing the charges against Mazzarella and indicting DiSimone. App. 12a, 41a-50a.

Petitioner moved to amend his Section 2255 motion for violations of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, based on Mazzarella's trial testimony and the government's failure to disclose the information in the transcript at the time of trial. Although the government consented to Petitioner's amendment, it filed an opposition on the merits to his *Brady* claims on September 13, 2007. App. 16a.

According to the government it learned about the Tape Recordings on February 8, 2007. Information that Mazzarella held Balancio down while Nick stabbed him was not disclosed to Petitioner for trial as *Giglio* material for Mazzarella or otherwise. Over two months later, the government advised Petitioner of the Tape Recordings when the government provided counsel with a copy of the transcript. The government's decision not to immediately disclose the *Giglio* materials to Petitioner, despite its continuing *Brady* obligations, was made in consultation with Deputy AUSA Cathy Seibel. That decision was based upon the *reliability* of the informant's information, a *belief* the informant's information on the Tape Recordings was inaccurate and a *possibility* the informant's information pertained to a different murder. The government conceded the following:

- That it was aware of the *Brady* material at the time of petitioner's trial five years before the Tape Recordings were uncovered. App. 41a, 51a.
- That an FBI 302 report, dated 9/17/97, was in the government files relating to its investigation of the informant in the tran-

scripts, the petitioner and the Tanglewood Boys at the time of trial. App. 51a.

- That there were no other recordings on the subject, no FBI reports of the debriefing to which Pomerantz referred or the follow-up interviews of the informant that Pomerantz said would occur and no reports relevant to the recordings by the government or WCDA prosecutors involved with Mazzarella until 2007. App. 12a, 51a-56a.

Remarkably, the ranking prosecutors involved with the tape recordings claimed they had no memory of the events, or had hazy recollections of the events. Then again, they all were certain that the informant's information was thoroughly investigated and discounted. The collective lack of memory of the high-ranking governmental participants is disturbing because it raises a possibility of fraud. So too, with the memories of the FBI Agents involved; in particularly, SA David Calore. Unfortunately, Petitioner is left to speculate as to what because former SDNY and WCDA prosecutors and FBI agents cannot remember what happened. In short, when confronted with information that Mazzarella committed perjury and breached his cooperation agreement in 1997, the government and WCDA did essentially nothing.

Even so, the District Court credited the government's self-serving version of events without making findings of fact regarding the *Brady* violations, holding a hearing, or requiring the government to provide affidavits from the gov-

ernmental participants to the *Brady* violations, much less Mazzarella and Timothy Owen[4]. Although the District Court concluded the suppressed *Brady* material was cumulative impeachment and "neither material nor prejudicial," Petitioner established the materiality of this evidence since the government's case depended almost entirely on Mazzarella's testimony. Moreover, because the suppressed evidence undercut the thoroughness and good faith of the government's investigation of Mazzarella it could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 446, n. 15 (1995). In rejecting Petitioner's *Brady* claim, the District Court never considered the favorability or materiality of the evidence discrediting the government's investigation of Mazzarella.

[4] The government contends that during its 2007 investigation it learned Timothy Owen was the informant mentioned in the transcripts.

REASONS FOR GRANTING THE PETITION

The Court Should Grant the Petition to Resolve Important Questions With Extensive Implications Concerning the Public Interest in the Fair Administration of Criminal Justice.

a. The United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

This case presents uniquely important questions because it affects criminal cases where the government uses the out-of-court statements of an unindicted co-conspirator to establish its burden of proof at trial and defendant's lawyer fails to disclose to defendant and the District Court their representation of the unindicted co-conspirator. Given the ease and frequency in which the government introduces an out-of-court statement of an indicted or unindicted co-conspirator under Fed. R. Evid. 801(d)(2)(E), to establish its burden of proof at trial, counsel's failure disclose such representation will adversely affect a defendant's Sixth Amendment right to conflict-free counsel in future cases involving multiple or successive representation. When the Second Circuit denied Petitioner a COA regarding this issue, it decided an important question of federal law that has not been, but should be, settled by this Court. Although both the District Court and the Second Circuit decided this issue was of no constitutional moment, Petitioner respectfully contends otherwise.

Defense counsel never disclosed to Petitioner or the District Court their representations of five unindicted co-conspirators whose out of court statements counsel knew the government would use to establish its burden of proof at trial. Consequently, Petitioner went to trial unaware defense counsel were laboring under devastating conflicts of interest. At once, defense counsels co-existing duties of loyalty and confidentiality to Petitioner and the unindicted co-conspirators prevented counsel from presenting a full defense on his behalf, or placing the unindicted co-conspirators in harms way.

This Court's precedents involving conflicts of interests have not considered the impact of defense counsel's failure to disclose the representation of unindicted co-conspirators on a defendant's Sixth Amendment rights. Although the Court has resolved issues of joint representation of co-defendants over counsel's and defendant's objection, the failure of defendants and counsel to object to joint representation, a judge's duty to inquire, if the judge knew or should have known of a potential conflict, and, a defendant's burden to establish a Sixth Amendment violation where the court failed to inquire into a potential conflict of interest; this case is different. *See i.e.*; *Glasser v. United States*, 315 U.S. 60, 76 (1942); *Holloway v. Arkansas*, 435 U.S. 475, 481-482 (1978); *Cuyler v. Sullivan*, 446 U.S. 335, 340 (1980); *Wood v. Georgia*, 450 U.S. 261 (1981); and *Mickens v. Taylor*, 535 U.S. 162 (2002).

What sets this case apart is that defense counsels' clients were unindicted co-conspirators. Although never present courtroom, the government repeat-

edly used their out-of-court statements at trial to convict Petitioner. The District Court recognized as much. Because defense counsels' clients were unindicted co-conspirators as opposed to co-defendants—absent disclosure—it was impossible for Petitioner to know or object to his defense counsels' representation of the very individuals whose out of court statements would contribute to his conviction. Here, the facts differ from those in *Glasser*, *Holloway*, and *Sullivan* where the petitioners and respondents knew defense counsel was representing co-defendants, raised objections, and were aware of the conflicts of interest.

Because defense counsel knew the government would use the out-of-court statements of there clients to convict Petitioner, they had a duty to disclose the representations to Petitioner and the District Court. Defense counsels' "obligation . . . to avoid conflicts of interest," was triggered moment they learned the government would use the unindicted co-conspirators statements at trial. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). Unfortunately, the facts show defense counsel concealed their representation of unindicted co-conspirators.

Petitioner had a Sixth Amendment right to representation by conflict free counsel. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). That right was violated. Defense counsel had a duty to disclose their representation of the unindicted co-conspirators to petitioner and the District Court, that duty was violated. *See Mickens*, 535 U.S. at 185 (STEVENS, J. dissenting). This Court has made clear that the true evil of representing clients with conflicting interests "is in what the advocate finds

himself compelled to *refrain* from doing." *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). At trial, it was vital that Petitioner have the undivided assistance of his counsel because the liberal rules of evidence were certain to operate unfairly against him. *See Glasser v. United States*, 315 U.S. 60, 76 (1942). Here, as in *Holloway*, it was intuitively and demonstrably obvious that "counsel's conflicting obligations to multiple defendants effectively sealed [their] lips on crucial matters" and make it impossible for them to provide Petitioner with the effective assistance of counsel the Sixth Amendment guarantees. *Holloway*, 435 U.S. at 489-490.

Moreover, because it is "counter to our precedent to treat all Sixth Amendment challenges involving conflicts of interest categorically, without inquiry into the surrounding factual circumstances," defense counsels' cross-examination of Joseph Defede merits the Court's review. *See Mickens*, 535 U.S. at 187. Because when, combined with defense counsels' representation of the unindicted co-conspirators, "this is the kind of representational incompatibility . . . is egregious on its face." *Mickens*, 535 U.S. at 210 (Breyer and Ginsburg, JJ., dissenting.) Beyond debate, defense counsels' conflicting obligations to Petitioner and the unindicted co-conspirators along with Defede's cross-examination demonstrates a "breakdown in the criminal justice system . . . the appearance that the proceeding [did] not reliably serve its function as a vehicle for determination of guilt or innocence, and the resulting criminal punishment will not be regarded as fundamentally fair." *Mickens*, 535 U.S. at 210 (internal citations and quotations omitted).

Although a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law, the District Court's selective application of the facts and its legal conclusion that there were no conflicts of interest presents compelling reasons for the Court to grant the petition. To begin with, the District Court never applied important facts to support its conclusion that defense counsels' representation of the unindicted co-conspirators did not amount to a "conflict of interest." It never considered that the duty of loyalty is "perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692. In so doing, the District Court consistently overlooked that Petitioner's defense counsel had a continuing duty of loyalty and confidentiality to the unindicted co-conspirators, regardless of when their representations concluded. See *United States v. Jones*, 381 F.3d 114, 119 (2d Cir. 2004) ("An attorney has an actual conflict of interest . . . when the attorney's representation of the defendant is impaired by loyalty owed to a prior client.") Furthermore, that the government used unindicted co-conspirators out-of-court statements to establish its burden of proof at trial and that defense counsel's representation of the unindicted co-conspirators was never disclosed to the Petitioner or the District Court. In reaching its legal conclusions, the District Court impermissibly conflated the legal standard regarding actual and potential conflicts of interest by requiring Petitioner to show prejudice. See *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

Finally, this case presents the Court the opportunity to resolve what it did not in *Mickens*. The

issues presented here are squarely on point with Justice Scalia's thoughts when he opined that "[i]n resolving this case on the grounds on which it was presented to us, we do not rule upon the need for the Sullivan prophylaxis in cases of successive representation. Whether Sullivan should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question." *Mickens*, 535 U.S. at 176.

b. The decisions below conflict with Kyles and permits the government to violate its Due Process obligations under Brady and its progeny

The Panel's order and District Court opinion conflict with this Court's decision *Kyles* by diluting the materiality and favorability standard as it applies to evidence discrediting the thoroughness and integrity of a governmental criminal investigation, thereby permitting the government to violate its Due Process obligations under *Brady* and its progeny. When it secreted facts concerning Mazzarella's cooperation with prominent and high-ranking federal and state prosecutors the government prevented the jury from assessing favorable information and thereby undermined the reliability of the verdict.

In *Strickler* the Court found "[t]here are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

The evidence at issue was favorable to Petitioner because it was impeaching. The government's case "depended almost entirely on [Mazzarella's] testimony; without it there could have been no indictment and no evidence to carry the case to the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972). The evidence was suppressed because the government acknowledged the evidence was not disclosed to Petitioner for trial and that FBI 302 (App. 53a-54a) reports were in its files regarding its investigation of the Tanglewood Boys, the Petitioner, and information in the transcripts at the time of trial. App. 11a-12a. "Brady suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecution . . . ." *Youngblood v. West Virginia*, 547 U.S. 867, 869-870 (2006). Moreover, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437.

Under *Brady*, "evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 676, (1985). In *Kyles*, the Court elaborated on this standard:

> [The] touchstone of materiality is a reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in

a verdict worthy of confidence. *Kyles*, 514 U.S. at 434.

In *Kyles*, the Court invalidated the petitioner's conviction because the prosecution suppressed evidence of inconsistencies in the stories given to police by key witnesses. *Kyles*, 514 U.S. at 433-434. Such evidence was exculpatory, favorable, and material because it undercut the government's evidence and called into question the competence or good faith of its investigation. *Kyles*, 514 U.S. at 441-45. Such evidence was material and favorable because it could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

Here, as in *Kyles*, the suppressed evidence was favorable and material because it could have been used to discredit the thoroughness and integrity of a governmental criminal investigation regarding its principal cooperating witness, Darren Mazzarella, at trial. For instance:

- Ranking state and federal prosecutors expressed dire concerns regarding Mazzarella's credibility as early as December 18, 1997. App. 44a.
- Ranking state and federal prosecutors concerns that Mazzarella breached his cooperation agreements in December 18, 1997. App. 44a.
- Pomerantz advising the WCDA to cancel a press conference announcing that the indictment charging Mazzarella with the Balancio homicide would be dismissed.

Moreover, that the WCDA acted immediately and canceled the press conference. App. 45a-46a.

- That there were no other recordings on the subject, no FBI reports of the debriefing to which Pomerantz referred or the follow-up interviews of the informant that Pomerantz said would occur and no reports relevant to the recordings by the government or WCDA prosecutors involved with Mazzarella at the time of trial in 2002. App. 12a.

Those facts could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 434-437. The facts also "revealed a remarkably uncritical attitude on the part of the [government]" regarding the centerpiece of its case, Darren Mazzarella. *See Kyles*, 514 U.S. at 445. Unfortunately, but for the secretly recorded conversation, the *Brady* materials would have never have become known. Here, the issue is not "whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial." *Kyles*, 514 U.S. at 434. The jury may have considered Mazzarella's testimony differently after hearing testimony from the ranking state and federal prosecutors expressing significant concerns about his credibility, cooperation agreements, and the steps not taken to confirm or dispel evidence that Mazzarella had been lying to them. Of course, "after everything that's gone under the bridge" it was easier for the government

to *trust* Mazzarella instead of receiving "egg on our face[s]" and secret the information. App. 47a.

Nevertheless, the courts below did not consider such evidence favorable or material when dismissing Petitioner's *Brady* claims. Consequently, the Second Circuit panel order and District Court opinion diluted the materiality and favorability standard as it applies to evidence discrediting the thoroughness and integrity of a governmental criminal investigation, which could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. In so doing, the courts below permitted the government to violate its Due Process obligations under *Brady* and its progeny.

This case presents an important question because it affects every case in which evidence discrediting the thoroughness and integrity of a governmental criminal investigation is favorable and material under *Brady*. This Court's intervention is therefore necessary to preserve not only Petitioner's rights to a fundamentally fair trial but also the public interest in the fair administration of criminal justice.

c. *The decisions below conflict with other Circuits recognizing the favorability and materiality of the same evidence here*

Other Circuits have recognized the favorability and materiality of the same evidence here, which "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. *See i.e.*:

- NINTH CIRCUIT *See, e.g., United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000) (government has a "duty to disclose evidence of a flawed police investigation," which could be used by defense counsel "to attack the thoroughness, and even good faith, of the investigation").
- TENTH CIRCUIT *See, e.g., Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation").
- FIFTH CIRCUIT *See, e.g., Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (granting new trial to where suppressed evidence "carried within it the potential . . . [for] the discrediting . . . of the police methods employed in assembling the case against him").
- SECOND CIRCUIT *See, e.g., Mendez v. Artuz*, 303 F.3d 411, 416 (2d Cir. 2002) (deciding "defendant could have used the suppressed information to challenge the thoroughness and adequacy of the police investigation.").

These decisions show the evidence at issue here is favorable and material when courts assess *Brady* violations. In contending otherwise, the District Court and Second Circuit conflict with *Mendez v. Artuz*, 303 F.3d 411, 416 (2d Cir. 2002) and the decisions of other Courts of Appeals finding the same evidence favorable and material.

This Court should grant the Petition to secure and maintain uniformity with its decision in *Kyles* concerning the materiality and favorability standard as it applies to evidence discrediting the thoroughness and integrity of a governmental criminal investigation.

d. The government may not guard the henhouse

The government must disclose favorable evidence it considers unreliable. "And it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence." *United States v. Bagley*, 473 U.S. 667, 698 (1985) (Marshall, Brennan, JJ. dissenting) Because "[w]hen the state does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and thereby undermines the reliability of the verdict." *Bagley*, 473 U.S. at 692. Here, however, the government and courts below disregarded that "it is for the jury, not the prosecutor, to decide whether favorable information in a police record is credible; otherwise prosecutors might, on a claim that they thought it unreliable, refuse to produce any matter whatever helpful to the defense, thus setting Brady at nought." *Lindsey v. King*, 769 F.2d 1034, 1040 (5th Cir.1985). Where, as here, "if there were questions about the reliability of the exculpatory information, it was the prerogative of the defendant and his counsel—and not of the prosecution—to exercise judgment in determining whether the defendant should make use of it." *DiSimone v. Phillips*, 461 F.3d 181, 195 (2d Cir.2006) (citing Mendez, 303

F.3d 411 (2d Cir.2002)) ("If the evidence is favorable to the accused . . . then it must be disclosed, even if the prosecution believes the evidence is not thoroughly reliable"). "To allow otherwise would be to appoint the fox as henhouse guard." *DiSimone*, 461 F.3d at 195.

These decisions show the District Court and Second Circuit panel's order conflicts with decisions of this Court and other Courts of Appeals decisions since favorable evidence the government considers unreliable must be disclosed to the defense. Such evidence was not considered favorable when the courts below resolved Petitioner's *Brady* claims because both courts credited the government's claim that the evidence was unreliable.

Like the prosecution in *DiSimone*, the government here too claimed the suppressed evidence was not *Brady* material because it was unreliable. *DiSimone*, 461 F.3d at 194. Unlike the court in *DiSimone*, however, the District Court allowed the government to explain away the favorability of the suppressed evidence by accepting without question the incredible accounts of the prominent and high ranking governmental prosecutors and FBI agents—all participants to the Brady violations—who claimed the evidence was unreliable. Remarkably, the District Court denied an evidentiary hearing regarding the *Brady* issues. Yet, *DiSimone* flatly rejected the exact reasoning the District Court used to dismiss Petitioner's *Brady* claims. *DiSimone*, *Lindsey*, and *Bagley* recognized the *Brady* doctrine would have no constitutional effect if a *Brady* claim could be rebuffed by the mere self-serving claims of its participants; which is exactly what the courts below permitted. By

suppressing this evidence, the government suppressed the facts about what actually happened before, during, and throughout Mazzarella's cooperation. Under *Brady*, such hostility to the truth offends Due Process of law.

This Court's intervention is therefore necessary to preserve not only Petitioner's rights to a fundamentally fair trial but also the public interest in the fair administration of criminal justice. This case presents an important question because it affects every prosecution involving *Brady* material, and every prosecutor's decision to disclose favorable information regarding a governmental criminal investigation or otherwise. To allow prosecutors to decide that evidence of questionable and disingenuous governmental criminal investigation was not favorable based upon a claim of the participants to the *Brady* violations that the evidence was unreliable would cast the *Brady* doctrine into an unconstitutional void.

e. The lower courts denial of an evidentry hearing and COA warrants an exercise of this Court's supervisory power

The District Court denied evidentiary hearings to resolve disputed facts involving *Brady* and Sixth Amendment violations. When the Second Circuit denied a COA, it sanctioned the District Court's departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Because state and federal district courts routinely grant evidentiary hearings to determine facts involving *Brady* and Sixth Amendment violations.

Here, Petitioner was entitled to an evidentiary hearing because "[u]nless the motion and the files and records . . . conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon." 28 U.S.C. § 2255.

This Court's precedents deciding *Brady* and Sixth Amendment violations show the cases received evidentry hearings to determine the validity of such claims in state or federal district court post conviction proceedings. See generally; *Banks*, 540 U.S. 668 (Evidentiary hearing); *Bagley*, 473 U.S. 667 (Evidentiary hearing); *Kyles*, 514 U.S. 419 (Evidentiary hearing); *Giglio*, 404 U.S. 150 (Evidentiary hearing); *Mickens*, 535 U.S. 162 (Evidentiary hearing) *Sullivan*, 446 U.S. 335 (Evidentiary hearing).

Additionally, the D.C. Circuit has held in a matter consistent with the facts here because the government's response to a *Brady* violation was an unsworn denial, remand for an evidentiary hearing was necessary to determine existence and materiality of the violation. *United States v. Kelly*, 790 F.2d 130, 135 (D.C. Cir. 1986). The Second Circuit has also required evidentiary hearings to determine Sixth Amendment and *Brady* violations. *See i.e.: United States v. LoCasio*, 395 F.3d 51 (2d Cir. 2005) (remanding for hearing to determine an actual conflict of interest); *Armienti v. United States*, 234 F.3d 820 (2d Cir. 2000) (same); *Amiel v. United States*, 209 F.3d 195 (2d Cir. 2000) (same); *Ciak v. United States*, 59 F.3d 296, 307 (2d Cir. 1995) (same); *DiSimone*, 461 F.3d 181 (remanding for hearing on petitioner's *Brady* claim); and, *United States v. Rodriguez*, 496 F.3d

221 (2d Cir. 2007) (remanding for hearing to determine the substance of government witness's lies during interview with law enforcement authorities). *See also*, *Mendez*, 303 F.3d 411 (hearing to determine *Brady* violation).

The foregoing facts and authorities demonstrate serious Sixth Amendment and *Brady* violations and that Petitioner was entitled to an evidentiary hearing under 28 U.S.C. § 2255. The denial by the lower courts of an evidentiary hearing strongly suggests that this Court correct the courts below. Guided by considerations of justice this Court may exercise its supervisory power to correct violations of recognized rights, to preserve the judicial integrity of a conviction by ensuring that a conviction rests on appropriate considerations validly before the jury, and as a remedy designed to deter illegal conduct. *See United States v. Hasting*, 461 U.S. 499 (1983).

When the courts below denied evidentiary hearings they condoned serious governmental misconduct and further undermined the truth-finding process regarding *Brady* violations. Regarding the Sixth Amendment violations, the courts abdicated their responsibilities to insure the integrity of a federal criminal trial. Because "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 168 (1988); *see also*, *United States v. Jones*, 381 F.3d 114, 119 (2d Cir. 2004).

Here, it worthwhile repeating, that Petitioner had never been convicted of any crime and is presently serving a sentence of life imprisonment.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 10-679

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of November, two thousand and ten.

JOHN PETRUCELLI,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appellant John Petrucelli, having filed a motion for reconsideration, or, in the alternative, for motion for reconsideration *en banc*, and the panel that determined the appeal having considered the request for motion for reconsideration, and the active members of the Court having considered the request for motion for reconsideration *en banc*,

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:

/s/ CATHERINE O'HAGAN WOLFE
Catherine O'Hagan Wolfe, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 10-679-pr

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of August, two thousand ten,

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Present: DENNIS JACOBS, *Chief Judge*, JOSE A. CABRANES, PETER W. HALL, *Circuit Judges*.

JOHN PETRUCELLI,

Movant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:

/s/ CATHERINE O'HAGAN WOLFE
Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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05 Civ. 9582 (TPG)
02 Cr. 099 (TPG)

JOHN PETRUCELLI,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

OPINION

John Petrucelli, a federal prisoner, has filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, or, in the alternative, for a hearing, on the grounds that (1) he was denied his Sixth Amendment right to representation by conflict-free counsel; (2) his representation at trial was ineffective in violation of the Sixth Amendment; (3) the Government improperly withheld impeachment materials for its witnesses in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny; and (4) he was deprived

of his Sixth Amendment right to effective assistance of counsel because the Government's death penalty case was "illusory from its inception."

Petrucelli has filed a separate motion to amend his original motion so as to include claims under *Brady* and *Giglio*. That motion is granted.

Petrucelli is represented by new counsel on the § 2255 motion. The Government has answered.

For the reasons set forth hereafter, the § 2255 motion, as amended, is denied.

BACKGROUND

A: *The Facts*

This statement of facts is drawn from the trial record. Of course, Petrucelli has continued in his not guilty position regarding the murder he has been convicted of. But the court believes that the evidence supports the conviction, thus the following recitation of the facts.

Throughout the early 1990s, John Petrucelli was a member of the Tanglewood Boys, a violent gang that regularly engaged in murder, armed robbery, burglary, loan sharking, and bookmaking in the Bronx and Westchester County. The Tanglewood Boys' membership was comprised chiefly of young men who wished to become members of the Luchese Organized Crime Family.

In the early morning of June 20, 1995, Tanglewood Boy member Darin Mazzarella was shot by Michael Zanfardino, an associate of the rival Genovese Family. Petrucelli witnessed the shooting. A few hours later, near P.S. 108 in the Bronx, Petrucelli stabbed Paul Cicero, a cousin of a Genovese

Family associate, to avenge the shooting of Mazzarella. Sean McKernan, a childhood acquaintance of both Petrucelli and Cicero, saw Petrucelli lunge at Cicero from his position seated on a stoop near P.S. 108, but he did not observe the stabbing because a concrete wall blocked the lower three-quarters of Petrucelli's and Cicero's bodies. After Petrucelli left the scene, Cicero passed in front of the stoop where McKernan was sitting and said, "That bastard Johnny just stabbed me" while clutching his stomach. Cicero subsequently bled to death on the operating table at a nearby hospital.

On June 21, 1995, the day after the shooting and stabbing, Steven Crea, the Underboss of the Luchese Family, summoned Petrucelli to a meeting. Crea explained that the Genovese Family had contacted him to prevent the Tanglewood Boys from taking revenge against Zanfardino. Petrucelli informed Crea that he had stabbed Cicero in response to Mazzarella's shooting. Petrucelli then fled to Las Vegas, where he stayed with his grandmother, and later his aunt and uncle, for several weeks.

A few days later, Acting Boss of the Genovese Family, Liborio Bellomo, requested a meeting with Joseph Defede, the Acting Boss of the Luchese Family, to discuss the circumstances surrounding the shooting and stabbing. Bellomo asked Defede to ensure that the Tanglewood Boys not to pursue Zanfardino and argued that the Cicero murder constituted sufficient revenge against the Genovese Family for Mazzarella's shooting. Defede granted Bellomo's request.

In early 1996, after Mazzarella had recovered from his gunshot wounds, he met with Defede to

discuss his desire to retaliate against Zanfardino. Defede explained that revenge would be unjustified because of Cicero's murder and instructed Mazzarella not to exact retribution.

Several days later, at Defede's request, Mazzarella and Zanfardino met and formally called a truce.

B: *Procedural History*

1) Pre-Trial

On January 28, 2002, Petrucelli was indicted by a federal grand jury on one count of murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1).

a) Production Of *Brady/Giglio* Material

On February 22, 2002, defense counsel requested that the Government produce all *Brady* and *Giglio* material. The Government responded to Petrucelli's request on March 20, 2002, stating that it was unaware of any *Brady* material and that it would provide *Giglio* material, to the extent any existed, when it provided prior statements of witnesses under 18 U.S.C. § 3500. On June 21, 2002, Petrucelli's counsel renewed its request for *Brady* material and asked the court to order production and inspection of this information. The Government opposed the motion on July 12, 2002, reiterating its good-faith representations that there was no *Brady* material to supply. On October 21, 2002, the court denied Petrucelli's application for court-ordered production and inspection of *Brady* material.

b) Plea Offer

Some time in June 2002, Larry Bronson, Esq., who was retained by Petrucelli specifically for the purpose of exploring disposition of the case in advance of trial, contacted AUSA David N. Kelley and asked for a plea offer from the Government. Later that month, AUSA Kelley communicated a plea offer to Bronson on behalf of Petrucelli. At some point prior to trial, Bronson telephoned either AUSA Kelley or AUSA David Raskin and rejected the plea offer.

2) The Trial

Petrucelli's trial commenced on October 21, 2002 and concluded on November 4, 2002. The Government's evidence included: (1) testimony of two cooperating witnesses, Mazzarella and Defede, each of whom was apprised by confidants of Petrucelli's stabbing of Cicero and subsequent flight to Las Vegas, and each of whom became embroiled in extensive negotiations between the Luchese and Genovese Families concerning Mazzarella's right to avenge his shooting; (2) testimony of Sean McKernan, the eyewitness to the stabbing; (3) testimony of Petrucelli's aunt regarding his unannounced stay with her in Las Vegas after the stabbing; (4) records reflecting Petrucelli's failure to reclaim his car after it was seized by the police near the scene of Mazzarella's shooting; (5) testimony and tangible evidence of racketeering activity routinely carried out by the Tanglewood Boys between 1989 and 1997; (6) surveillance photographs of Petrucelli meeting with members of the Tanglewood Boys and the

Luchese Family; and (7) testimony of Dr. James Gill, a medical examiner, who reviewed the autopsy report and photographs.

The defense called three witnesses: (1) Dr. Charles Wetli, an expert forensic pathologist, who testified that the shape of Cicero's wound evinced "additional movement" after the knife penetrated the abdomen but that this was not necessarily caused by the attacker; (2) Placido Borruso, the man who received Cicero after the stabbing and called the ambulance, who claimed that Cicero told him "a black guy" stabbed him; and (3) Marvin Specter, a professional engineer and licensed surveyor, who testified about a topographical survey he prepared regarding the sight lines at P.S. 108.

The jury convicted Petrucelli of the sole count in the indictment.

3) Post-Trial

a) Sentencing and Appeal

On February 7, 2003, this court sentenced Petrucelli to a mandatory term of life imprisonment and directed restitution of $8,000 for Cicero's funeral expenses. On May 12, 2004, Petrucelli's conviction was affirmed by the Second Circuit. *See United States v. Petrucelli*, 03-1100, 97 Fed. Appx. 355, 360 (2d Cir. May 12, 2004). On July 15, 2004, the Second Circuit denied Petrucelli's petition for rehearing en banc. And on November 15,2004, the United States Supreme Court denied *certiorari*.

b) § 2255 Motion And *Brady/Giglio* Amendment

Petrucelli filed the instant § 2255 motion on November 5, 2005, and the Government submitted its opposition on January 26, 2007.

On February 7, 2007, while reviewing tape recordings made by former Westchester County District Attorney Jeanine Pirro in connection with an unrelated grand jury investigation, the Government uncovered tapes of a December 18, 1997 conversation between Pirro and Mark Pomerantz, then chief of the criminal division of the United State Attorney's Office for the Southern District of New York ("SDNY"), concerning Mazzarella's involvement in the 1994 murder of Louis Balancio. At the time of the recording, Mazzarella was under indictment in Westchester County for his role in the murder of Balancio. The indictment was based on information that Mazzarella held Balancio while he was stabbed by another person. But based on new evidence that one of Mazzarella's Tanglewood Boy confederates, Anthony DiSimone, was in fact responsible for the murder of Balancio, the Westchester County District Attorney's Office ("WCDA") was poised to dismiss the charges against Mazzarella and indict DiSimone instead. The tape-recorded conversation revealed, however, that Pomerantz, through a wholly separate investigation, became aware of information from an FBI informant suggesting that Mazzarella participated in the murder of Balancio. Specifically, the informant corroborated the indictment, claiming that Mazzarella told him

that he held Balancio down while his brother, Nick Mazzarella, stabbed him.

Pirro and Pomerantz found this new information alarming, particularly because the WCDA was on the verge of announcing DiSimone's indictment in connection with the Balancio murder. Moreover, only days earlier, the SDNY had permitted Mazzarella to plead guilty pursuant to a cooperation agreement to all-encompassing racketeering charges that did not include the Balancio murder. The cooperation agreement with the SDNY required Mazzarella to disclose truthfully his entire criminal history. Pomerantz, however, repeatedly expressed reservations about the veracity of the information, as it was obtained only hours earlier from an untested informant and was subject to further investigation. No other tape recordings on this subject were located.

In early 1998, less than two months after the tape-recorded conversation, the WCDA dismissed the charges against Mazzarella for his role in the Balancio murder, and DiSimone was indicted. At trial in the Petrucelli case, Mazzarella adamantly denied any involvement in the Balancio murder.

Upon discovering the tapes in February 2007, AUSA David Raskin embarked upon an extensive investigation to uncover the explanation for the information on the tape recordings and the subsequent nondisclosure in order to determine the effect, if any, on Petrucelli's trial. The relevant steps are summarized below:

AUSA Raskin first spoke with Mark Pomerantz, who had no recollection of the calls or even the subject matter of the calls. Pomerantz was certain, however, that the informant's information to

which he referred on the tape recordings had been investigated appropriately and discredited or else the SDNY would not have adhered to its cooperation agreement with Mazzarella and the WCDA would not have dismissed its charge against Mazzarella.

AUSA Raskin also spoke with Kerry A. Lawrence, the AUSA responsible for Mazzarella's plea and cooperation at the time of the tape recordings. Lawrence had a vague recollection of an issue arising, and then being resolved, in connection with Mazzarella's plea, but he had no memory of the details. Lawrence was sure, however, that the informant information discussed on the tape recordings was investigated fully and determined to be false, otherwise the SDNY would not have maintained its cooperation agreement with Mazzarella.

AUSA Raskin interviewed Special Agent David Calore, the FBI agent responsible for Mazzarella's cases and the investigation of the Balancio murder. Agent Calore had no recollection of the events Pomerantz described on the tape recordings nor did he specifically recall conducting a follow-up interview of an informant on matters referenced in the tape recordings. Agent Calore was confident that had such an interview occurred, he would have been the agent conducting the interview. He also pointed out that the information was invalid on its face because, based on his knowledge of Mazzarella's cases, Nick Mazzarella was not present at the scene of the Balancio murder.

AUSA Raskin had multiple telephone conversations with James A. McCarty, Jr., WCDA's current First Deputy District Attorney, who was

responsible for performing a similar investigation into the tape recordings. McCarty's investigation failed to shed any light on the substance of the tape recordings.

On March 17, 2007, AUSA Raskin contacted Mazzarella himself. Raskin asked Mazzarella whether he recalled telling anyone that he had held down Balancio while his brother had stabbed him. Mazzarella replied that he was "a million percent" sure that he never made such a statement. Moreover, Mazzarella reiterated that he did not participate in the murder and that his brother was not even present at the scene of the murder.

AUSA Raskin reviewed all of the pertinent SDNY files concerning Mazzarella and related investigations with no positive results.

Finally, at AUSA Raskin's request, the FBI canvassed its files pertaining to Mazzarella to determine the identity of the informant that Pomerantz described on the tape recordings. The search yielded negative results.

On April 25, 2007, the Government notified Petrucelli of the tape recordings by providing his counsel with a copy of the transcript of the telephone calls.

For the next two months, AUSA Raskin persisted in his investigation into the identity of the informant mentioned on the tape recordings. After pursuing several leads, AUSA Raskin successfully located the informant on the tape recordings, Tim Owen. On May 16, 2007, AUSA Raskin participated in a telephonic interview of Owen. Owen recalled informing the FBI that he heard Mazzarella state that he held down Balancio while Nick Mazzarella stabbed him. When pressed,

Owen admitted that he did not learn the information from Mazzarella directly, but rather overheard Mazzarella discussing Nick Mazzarella's involvement in a murder at a party. Moreover, Owen did not hear Mazzarella or anyone else mention Balancio. Instead, Owen simply assumed that the statement related to the Balancio murder because he recalled that Mazzarella had been released recently on bail on the Balancio murder charges.

After interviewing Owen, the Government determined that his recollection was less credible than that reported by Pomerantz on the tape recordings because: (i) Owen only overheard Mazzarella's statement as opposed to having heard it directly; (ii) Owen simply assumed that the statement related to the Balancio murder but did not have any specific evidence linking Mazzarella to the murder; (iii) Owen's assumption had an insufficient basis; and (iv) Owen's claim that he overheard Mazzarella at a party soon after Mazzarella was released on bail on the Balancio charges was inconsistent with the time frame originally reported by Pomerantz on the tape recordings. And based on several accounts, Nick Mazzarella was not present at the scene of the Balancio murder, further undercutting Owen's version of events. Moreover, if Owen's information had not proved inaccurate, Mazzarella would have been in breach of his cooperation agreement. Yet the SDNY never accused Mazzarella of violating the terms of his cooperation agreement. As a result, the Government determined that the information on the tape recordings was unreliable and thus

would have been neither favorable nor material to Petrucelli's defense and trial.

On June 1, 2007, the Government provided notice of these additional facts to Petrucelli's counsel and explained that it was the Government's position that no *Brady/Giglio* violation had occurred in Petrucelli's case. In light of this new information, on June 28, 2007, Petrucelli moved to amend his § 2255 motion to assert claims for *Brady/Giglio* violations. While the Government consented to Petrucelli's amendment, it filed an opposition on the merits on September 13, 2007. Petrucelli filed an omnibus reply in support of his original § 2255 motion and *Brady/Giglio* amendment on February 15, 2008.

DISCUSSION

Petrucelli challenges his conviction under 28 U.S.C. § 2255 on the grounds that (1) he was denied constitutionally effective assistance of counsel because his two trial attorneys had actual conflicts of interest that adversely affected their representation; (2) his trial counsel's performance fell below the constitutionally acceptable standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984); (3) the Government deliberately violated its constitutional obligations under *Brady* and *Giglio* by intentionally suppressing favorable impeachment evidence in advance of Petrucelli's trial; and (4) the Government's pursuit of the death penalty was merely a means to bypass the statute of limitations. Each of these claims is addressed in turn.

Conflict of Interest

"The right to counsel under the Sixth Amendment entails a correlative right to representation that is free from conflicts of interest." *United States v. Levy*, 25 F.3d 146, 152 (2d Cir, 1994). A defendant will have suffered ineffective assistance of counsel in violation of his Sixth Amendment rights if his attorney has a *per se* conflict, an actual conflict that adversely affects the attorney's performance, or a potential conflict that results in prejudice to the defendant. *See Winkler v. Keane*, 7 F.3d 304, 307 (2d Cir. 1993).

To prevail on a Sixth Amendment claim based upon the actual conflict standard, a defendant must show that an actual conflict existed and then must demonstrate that this conflict adversely affected defense counsel's performance. *See Mickens v. Taylor*, 535 U.S. 162, 171 (2002); *United States v. Schwarz*, 283 F.3d 76, 91-92 (2d Cir. 2002). An actual conflict between a lawyer and his client exists "when, during the course of the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action." *Winkler*, 7 F.3d at 307. If the defendant establishes that an actual conflict exists, "he need not prove prejudice, but simply that a 'lapse of representation' resulted from the conflict." *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995). That is, the defendant must "demonstrate that some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Levy*,

25 F.3d at 157. Where a defendant can establish only potential conflict, a showing that a lapse of representation occurred is not sufficient; the defendant must show that he has been prejudiced by counsel's actions. *See Winkler*, 7 F.3d at 307.

Petrucelli contends that he was deprived effective assistance of counsel because his attorneys Diarmuid White, Esq. and David Breitbart, Esq. suffered from actual conflicts of interest based on their representations of other mob clients who were defendants in the Southern District of New York, the Eastern District of New York, and state courts in New York and Westchester counties. Petrucelli suggests that White's and Breitbart's allegiances to these other clients dictated their trial strategy at the expense of Petrucelli, resulting in a protracted and ineffective cross-examination of Joseph Defede and their failure to pursue several alternative approaches at trial.

Alleged Actual Conflicts

Diarmuid White and David Breitbart were Petrucelli's trial counsel. Petrucelli claims that that White had actual conflicts of interest arising from his representation of Anthony Santorelli, Alfred Santorelli, Anthony DiSimone, and Steven Crea. Petrucelli contends that Breitbart had actual conflicts stemming from his representation of Christopher Furnari, Joseph Massino, Louis Daidone, and Liborio Bellomo.

The facts about these alleged representations are as follows:

- *Anthony Santorelli*: White represented Anthony Santorelli from approximately

1998 to February 2001 on charges of tampering with physical evidence in connection with the 1994 murder of Louis Balancio. White represented Santorelli at trial in Westchester County and through all stages of appeal, including the Second Circuit's affirmance of the district court's denial of Santorelli's habeas corpus motion.

- *Alfred Santorelli*: White served as Alfred Santorelli's counsel from approximately 1998 to February 17, 1999. After waiving indictment and pleading guilty to an information charging him with conspiracy to commit assault and loan sharking in aid of racketeering, the district court sentenced Santorelli to 37 months' imprisonment.
- *Anthony DiSimone*: White represented DiSimone from roughly November 1999 to February 2003 in connection with his arrest for the murder of Louis Balancio.
- *Steven Crea*: Luchese Family Underboss Crea retained White to assist with a New York county extortion case. Crea was indicted on August 24,2000, pleaded guilty on March 8, 2004, and was sentenced on May 4, 2004.
- *Christopher Furnari*: Breitbart represented Furnari in connection with a habeas corpus petition challenging a New Jersey parole board decision. The Third Circuit decided the case on July 12, 2000.

- *Joseph Massino*: From January 27, 2003 to July 11, 2005, Breitbart represented Massino in two prosecutions in the Eastern District of New York—a racketeering conspiracy involving the Bonanno Family and certain capital offenses.
- *Louis Daidone*: In December 2002, Daidone was indicted in the Southern District of New York for murder in aid of racketeering. He was later convicted and sentenced to life imprisonment in 2004. There is no indication, however, that Breitbart represented Daidone at any time.
- *Liborio Bellomo*: Bellomo, the Acting Boss of the Genovese Family, was indicted in the Eastern District of New York on racketeering charges on February 1, 2002. On April 7, 2003, Bellomo pleaded guilty and was later sentenced to 48 months' imprisonment on October 21, 2003. While Breitbart did not file a notice of appearance and, consequently, his name does not appear on the docket sheet, Petrucelli points to evidence that Breitbart was authorized to attend joint defense meetings and is named on numerous pre-trial motions.

This listing does not show any actual conflicts. Three of the eight items involve representations in matters which were concluded before the Petrucelli trial. More importantly, there are no instances where Petrucelli has even indicated that White or Breitbart represented someone who had an interest in conflict with the interest which

Petrucelli had in his case. There is simply no showing, in anything approaching a factual, concrete manner, of a conflict between Petrucelli's interest and the interests of these other people.

However, two of the points require discussion. These are the ones about White's representation of Anthony Santorelli and DiSimone in connection with the murder of Balancio. That murder was indeed referred to in the Petrucelli trial. Mazzarella was cross-examined about that murder in order to impeach him on the basis of his criminal acts. As already noted, Mazzarrella denied any involvement in the Balancio murder. To the extent that White represented Santorelli and DiSimone in the Balancio murder matter, this would, if anything, have led White to make the most vigorous cross-examination of Mazzarella to show that *he* committed the murder. There was no conflict of interest.

Alleged Potential Conflicts

1) Cross-Examination of Joseph Defede

Petrucelli claims that Breitbart's cross-examination of Joseph Defede, a cooperating witness and convicted Luchese Family Boss, was "entirely irrelevant, adverse, and fatal" to Petrucelli's case because Breitbart elicited evidence from Defede that counsel had attempted to exclude in advance of trial and instead focused the jury's attention on Petrucelli's organized-crime activities. Petrucelli argues that Breitbart's aim was to establish Defede's testimony for future criminal cases in which Breitbart represented other members of organized-crime families.

The Government suggests that rather than tainting the jury, Defede's gruesome description of the violent nature of the Luchese Family and chronicle of the various murders of its own members, including Petrucelli's father, helped cast doubt on Petrucelli's association with the Luchese Family, as it would be highly improbable for Petrucelli to desire admission to the organization responsible for killing his father. Breitbart's cross-examination also served to demonstrate Defede's lack of first-hand knowledge of the Cicero murder, weakening the testimony that incriminated Petrucelli directly. Indeed, Breitbart elicited testimony showing that while Defede was privy to all Luchese operations, he was wholly unaware of the activities of the Tanglewood Boys, helping to dissociate the two groups and thus Petrucelli's involvement with an allegedly criminal enterprise. And even though Defede was near the end of his sentence and therefore was not a typical cooperating witness offering testimony in the hopes of receiving leniency, by highlighting the vindictiveness and viciousness of the Luchese Family, Breitbart underscored Defede's desire for witness protection and established his motive to please the Government.

Petrucelli wholly fails to explain how Breitbart's questioning of Defede was beneficial to his alleged Mafia clients. Petrucelli does not demonstrate for which trials and which clients Breitbart attempted to procure testimony from Defede at the expense of Petrucelli. Rather, Breitbart waged an effective cross-examination, particularly considering Defede's position as a convicted felon.

2) Alternative Strategies

Petrucelli proposes four alternative strategies that his counsel could have undertaken but decided against pursuing based on their purported allegiance to their other organized-crime clients. According to this argument, counsel could have: (a) declined to cross-examine Defede and instead characterized his testimony as irrelevant in summation; (b) encouraged Petrucelli to take the stand in his own defense; (c) called various Mafia witnesses to testify on Petrucelli's behalf; and (d) pursued a plea or cooperation agreement with the Government.

a) Cross-Examination of Defede

Petrucelli first suggests that Breitbart could have chosen to forego cross-examining Defede and instead could have argued in summation that his testimony was irrelevant. The description of this cross-examination given earlier in this opinion shows that the cross had a substantial purpose in the defense case. In any event, it is well established that the decision to engage in cross-examination and, if so, to what extent and in what manner, is a tactical decision that should not be second-guessed by the courts. *See Dunham v. Travis*, 313 F.3d 724, 732 (2d Cir. 2002). "Decisions concerning the nature and extent of cross-examination are the type of strategic decisions which, if reasonably made, will not constitute ineffective assistance of counsel." *United States v. Castillo*, No. 92 Civ. 3982, 1993 WL 51181, at *5 (S.D.N.Y. Feb. 23, 1993). Surely the decision to

cross-examine Defede was, to say the least, reasonably made.

b) Taking The Stand

Petrucelli also contends that his counsel's recommendation not to take the stand was motivated by the possibility that his testimony would have implicated other crime figures currently represented by counsel. However, there was ample reason in Petrucelli's own interests to advise him against testifying. The idea that this advice was given because of some conflicting interests, or potential conflicting interests, relating to other crime figures, is entirely speculative and has no substance. And as the Government notes, dissuading Petrucelli from testifying hardly constitutes a lapse in judgment because he would have opened himself up to vigorous cross-examination, including inquiry into two uncharged murders that the defense had convinced the court to exclude. Moreover, Petrucelli does not explain what his testimony would have been and how it would have advanced his case.

c) Mafia Witnesses

This claim is beyond the realm of reason. There is no indication that these people would have agreed to appear, or that an unwilling Mafia leader, needing to be subpoenaed, would have been helpful in any way. There is not the slightest reason to believe that such witnesses would have exonerated Petrucelli or gone any distance toward this result.

d) Plea Agreement

Finally, Petrucelli argues that White and Breitbart failed to pursue a plea bargain out of fear that Petrucelli's potential cooperation and testimony would hurt their other organized-crime clients. Petrucelli's assertion is belied by the record. In June 2002, Petrucelli's former counsel, Larry Bronson, Esq., secured a plea deal, which Petrucelli ultimately rejected. The case was not disposed of by a plea agreement and went to trial, but there is no evidence that this was the result of any failure on the part of White or Breitbart, or the result of any actual or potential conflict of interest.

Ineffective Assistance of Counsel

Under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant raising a claim of ineffective assistance must show (1) that his attorney's performance "fell below an objective standard of reasonableness," and (2) that prejudice resulted. *Id.* at 687. "The benchmark for judging any . . . claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *United States v. DiTommaso*, 817 F.2d 201,215 (2d Cir. 1987) (citing *Strickland*, 466 U.S. at 684-87).

In evaluating the first prong of the *Strickland* analysis, the court must determine whether counsel provided "reasonably effective assistance" to the defendant, "indulg[ing] a strong presumption that counsel's conduct falls within the wide range

of reasonable professional assistance," given that effective assistance can come in many forms and acknowledging that even "the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Decisions concerning investigation and strategy, including the arguments to stress, witnesses to call, motions to make, and lines of inquiry to pursue, fall squarely within the ambit of trial strategy and, if reasonably made, cannot support an ineffective assistance claim. *See United States v. Eisen*, 974 F.2d 246, 265 (2d Cir. 1992).

The second element of the *Strickland* test requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 695. Indeed, the Second Circuit repeatedly has proclaimed its "reluctance to second-guess matters of trial strategy simply because the chosen strategy was not successful." *Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983).

A. Alleged Inadequacies of Counsel

Petrucelli argues that White and Breitbart provided ineffective assistance in violation of his Sixth Amendment right to counsel because they were derelict in pursuing "obvious and reasonable" defenses, including: (1) overlooking evidence readily accessible through a proper pre-trial investigation; (2) impeding Petrucelli's right to testify; (3) neglecting to raise a statute of limitations defense; (4) declining to discuss with Petrucelli the possibilities of pleading guilty or cooperating

with the Government; and (5) failing to conduct an effective cross-examination of Defede.

1) Pre-Trial Investigation

Where allegations of ineffective assistance are conclusory and give no indication as to what exculpatory evidence may have been revealed by an investigation, a Sixth Amendment ineffective assistance claim based on failure to investigate is doomed. *See Curry v. Burge*, No. 03 Civ. 0901 LAKAJP, 2004 WL 2601681, at *31 (S.D.N.Y. Nov. 17, 2004). Rather, a "petitioner alleging that counsel's ineffectiveness was centered on a supposed failure to investigate has the burden of providing the court sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced." *Halo v. United States*, No. 06 CV 5041 (ARR)(RLM), 2007 WL 1299158, at *13 (E.D.N.Y. Apr. 30, 2007).

Petrucelli asserts that his counsel was ineffective because they did not conduct an adequate pretrial investigation. Specifically, he criticizes his counsel for failing to introduce evidence of a 1997 New York Police Department report that recounted an interview of a WCDA investigator who had tracked the Tanglewood Boys and concluded that they were not an organized criminal enterprise connected to the Luchese Family. The investigator also stated that his investigation had not revealed any connection between the Tanglewood Boys and Petrucelli. Because this information was readily available and accessible, Petrucelli argues that failing to conduct discovery into the creation of the report violated his Sixth Amendment right to effective counsel.

But Petrucelli does not allege how further inquiry into this 1997 police report would have bolstered his trial defense, and he makes no attempt to specify what admissible evidence such an inquiry would have yielded.

1) Right to Testify

For essentially the reasons articulated earlier, Petrucelli's contention that his counsel prevented him from testifying is insufficient to make a showing of ineffective assistance.

2) Statute of Limitations Defense

Petrucelli suggests that his counsel's performance was deficient because they neglected to raise a statute of limitations defense. This argument is unavailing, however, because based on the Second Circuit's affirmance in this case, a statute of limitations claim would have been futile. *See Petrucelli*, 97 Fed. Appx. at 359-60.

3) Alternatives to Trial

As established earlier, Petrucelli's former counsel, Larry Bronson, Esq., in fact pursued a plea offer, which Petrucelli declined. There was no alternative to a trial.

4) Defede's Cross-Examination

As evident from the record, Breitbart attempted to discredit Defede within the bounds of the Federal Rules of Evidence. As such, Petrucelli does not show that his counsel's cross-examination of Defede did not fall within the wide range of acceptable professional assistance.

B. Prejudice

Even assuming *arguendo* that counsel performed below an objectively reasonable standard, Petrucelli fails to satisfy the second prong of the *Strickland* standard. An evaluation of *Strickland* claims "usually begins with an examination of the strength of the Government's case." *United States v. Helgesen*, 669 F.2d 69,71 (2d Cir. 1982). And, where the evidence of guilt is overwhelming, the court may dispose of the case based on the petitioner's lack of prejudice, without the need to evaluate counsel's performance. See *United States v. Reiter*, 897 F.2d 639, 645 (2d Cir. 1990).

Here, Petrucelli has failed completely to show that there was a reasonable probability that he would not have been convicted absent his counsel's allegedly deficient representation. The Government presented interlocking evidence of Petrucelli's stabbing of Cicero and other racketeering activity from multiple sources. In fact, the court took particular note of defense counsel's performance in the face of overwhelming evidence of Petrucelli's guilt:

> I want to say that it is not my practice to deliver lectures at the time of sentencing . . . The defense attorneys did their best in presenting that evidence and in presenting their cross-examination and their arguments and whatever else they presented. But I would like to say . . . that I believe that the jury's verdict was absolutely justified. I believe that the Government's proof showed that Mr. Petrucelli committed this crime and that the proof was beyond a reasonable doubt.

Sentencing Tr., dated February 7, 2003, at 10-11. Because Petrucelli fails to allege, let alone establish, how the result of his case would have been different had any of his laundry list of shortcomings been corrected, there is no basis for finding that his attorneys acted unreasonably, or that any prejudice resulted from their actions. *See Vasquez v. United States*, No. 96 CIV. 2104 (PKL), 1996 WL 694439, at *7 (S.D.N.Y. Dec. 3, 1996) (dismissing ineffective assistance claim where petitioner's "allegations [welre vague, conclusory, and unsupported by citation to the record, any affidavit, or any other source" and finding that petitioner failed to demonstrate that but for the charged errors, the result would have been different). Therefore, because Petrucelli's complaints about his trial counsel's performance do not satisfy the strict criteria of *Strickland*, his Sixth Amendment claim in this regard has no merit.

Withholding Brady/Giglio Material

To succeed on a *Brady/Giglio* claim, it must be shown that: (1) the Government failed to disclose favorable evidence, and (2) the evidence it suppressed was "material." *See United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995). Undisclosed information "is deemed material so as to justify a retrial only if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different." *United States v. Spinelli*, 551 F.3d 159, 164-65 (2d Cir. 2008). For example, impeachment evidence is not material if the testimony of the witness was corroborated or when the suppressed evidence "merely furnishes an additional basis on

which to impeach a witness whose credibility has already been shown to be questionable." *Payne*, 63 F.3d at 1210.

Petrucelli argues that the Government impermissibly suppressed information about Mazzarella learned from informant Tim Owen in December 1997 that was both favorable to Petrucelli and material to the jury's finding of guilt. Based on the Government's investigation into Owen's account, however, it appears that Owen's version of events proved untrustworthy and was discredited by members of the SDNY, WCDA, and FBI after being vetted exhaustively. As such, Owen's information could hardly have had an overwhelming effect on the jury.

But even assuming the accuracy of Owen's information, Petrucelli cannot establish that its absence from his trial undermined confidence in the verdict. At trial, the Government elicited from Mazzarella his prior criminal conduct and bad acts. Mazzarella admitted that had pleaded guilty to participating in the Tanglewood Boys' racketeering enterprise and to committing multiple racketeering acts in furtherance of the enterprise, including murder, armed robbery, burglary, assault, extortion, loan sharking, and gambling. And Mazzarella in fact testified about the Balancio murder, acknowledging that he was part of the brawl that resulted in the killing of Balancio but stated that he himself did not participate in the stabbing. On cross-examination, Breitbart used all of this impeachment material to impugn Mazzarella's credibility by highlighting his motive for cooperation, his extensive Mafia ties, and his aggressive, violent behavior. At most, the infor-

mation concerning Owen's knowledge of Mazzarella's alleged participation in the Balancio murder might have caused Breitbart to ask Mazzarella a few more impeaching questions. But cumulative impeachment information is neither material nor prejudicial in the *Brady/Giglio* context.

In sum, Petrucelli had ample ammunition with which to attack the credibility of Mazzarella, and he did. Accordingly, the Govemment did not violate its duty to disclose under *Brady* and *Giglio*, so no habeas relief is warranted.

Government's Pursuit of the Death Penalty

Petrucelli states in conclusory fashion that even though the Government knew that it "could never obtain the death penalty in this case," it sought such remedy merely to circumvent the statute of limitations. But Petrucelli's claim is entirely meritless because he was charged under a statute that does impose a statute of limitations. *See* 18 U.S.C. § 1959(a)(I); *see also* 18 U.S.C. § 3281 (stating that an "indictment for any offense punishable by death may be found at any time without limitation."). As the Second Circuit held on appeal, "irrespective of whether the death penalty was sought . . . , [Petrucelli's] crime was properly characterized as being punishable by death simply because the death penalty was authorized by the statute under which [Petrucelli] was charged." *Petrucelli*, 97 Fed. Appx. at 359. Thus, there was no due process violation in pursuing the death penalty.

CONCLUSION

Petrucelli's § 2255 motion is without merit and is denied.[1] Because he has failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. The court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith.

Dated: New York, New York
December 15, 2009

SO ORDERED

/s/ THOMAS P. GRIESA
Thomas P. Griesa
U.S.D.J.

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[1] Merely filing a § 2255 motion "does not entitle petitioner automatically to a hearing" *Newfield v. United States*, 565 F.2d 203, 207 (2d Cir. 1977). To warrent an evidentiary hearing, a habeas etitioner must raise detailed and contrverted issues of fact supported by competent evidence, which, if proved, entitle him to relief. *See United States v. Aiello*, 814 F.2d 109, 113 (2d Cir. 1987). In light of the foregoing discussion of Petrucelli's arguments and new evidence, he has not met this burden.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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02 Crim. 099
INDICTMENT

UNITED STATES OF AMERICA

—v—

JOHN PETRUCELLI, a/k/a "Johnny Boy,"
a/k/a "Fat Face,"

Defendant.

COUNT ONE

The Grand Jury Charges:

The Enterprise

1. At all times relevant to this Indictment, in the Southern District of New York and elsewhere, JOHN PETRUCELLI, a/k/a "Johnny Boy" a/k/a "Fat Face," the defendant, and others known and unknown, were members of or associated with an organization known at various titles as the Tanglewood Boys, which was a gang that engaged in

murder, armed robbery, loansharking, theft, extortion, other acts of violence and gambling.

2. The Tanglewood Boys, including its leadership, membership and associates, constituted an "enterprise" as that term is defined in Title 18, United States Code, Section 1959 (b)(2), that is, a group of individuals associated in fact although not a legal entity, that was engaged in, and the activities of which affected, interstate and foreign commerce. At all times relevant to this Indictment, the enterprise operated principally in the Bronx and lower Westchester, New York.

Purposes of the Enterprise

3. Among the purposes of the enterprise were the following:

a. Enriching the members and associates of the enterprise through, among other things, murder, robbery, extortion and the operation of an illegal gambling business;

b. preserving and protecting the power and profits of the enterprise through the use of intimidation, extortion, violence, threats of violence, assaults and murder;

c. Keeping victims in fear of enterprise members and associates through acts and threats of violence;

d. Promoting and enhancing the enterprise and its members' and associates' activities; and

e. Enabling its members and associates to gain membership into the Luchese Organized Crime Family of La Cosa Nostra ("Luchese Fam-

ily" and "LCN") by showcasing their willingness to commit murder and other acts of violence, their fearlessness, and their earning capacity. The Luchese Family, like other LCN Families, had a "Boss," "Underboss," and "Consigliere," or other members acting in those capacities, and conducted its criminal activity through divisions known as "crews" and "regimes," consisting of a "Caporegime," "Capo," or "Captain," "made" members, sometimes known as "soldiers," "wiseguys," and "good fellows," and trusted non-members known as associates. Some associates of the Luchese Family formed the Tanglewood Boys gang, several members of which were "put on record" with the Luchese Family, meaning that a "made" member had notified the Family administration that he would be responsible for these associates and that they would be reporting to him. Members of the Tanglewood Boys enterprise had the prospect of gaining entry into the Luchese Family either by generating significant revenue from criminal activity, to be "kicked-up" up to the Family through the member with whom they were on record, or by completing a particularly dangerous or important act, such as murder.

Means and Methods of the Enterprise

4. Among the means and methods by which members and associates of the enterprise conducted and participated in the conduct of the affairs of the enterprise were the following:

a. Members of the enterprise and their associates committed, attempted and threatened to commit acts of violence, including murder, robbery

and extortion, to protect and expand the enterprise's criminal operations;

b. Members of the enterprise and their associates promoted a climate of fear through violence and threats of violence;

c. Members of the enterprise and their associates, many of whom were the sons of members of the Luchese Family and whom were "on record" with the Luchese Family, used that connection to enhance the enterprise's reputation for violence and to further promote a climate of fear;

d. Members of the enterprise and their associates were protected from rivals by the Luchese Family and to that end, exploited the connection between that Family and the enterprise's membership;

e. Members of the enterprise and their associates used, attempted to use, and conspired to use extortion;

f. Members of the enterprise and their associates used and threatened to use physical violence against other individuals;

g. Members of the enterprise and their associates exerted influence over potential witnesses against them through intimidation and threats of violence;

h. Members of the enterprise and their associates were involved in theft of goods being transported between states;

i. Members of the enterprise and their associates were involved in illegal gambling busi-

nesses and the collection of gambling debts from various individuals; and

j. Members of the enterprise and their associates extended extortionate lines of credit at usurious interest rates and used acts and threats of violence to collect loan payments.

5. At all times relevant to this Indictment, the Tanglewood Boys enterprise, described above, through its members and associates, engaged in racketeering activity, as that term is defined in Title 18, United States Code, Sections 1959(b) (1) and 1961(1), that is, acts involving murder, robbery and gambling, chargeable under New York Penal Law Sections 125.25, 160.1) and 225.10(1), respectively, as well as acts indictable under Title 18, United States Code, Section 659 (relating to theft from interstate shipment) and Title 1B, United States Code, Sections 891-894 (relating to extortionate credit transactions).

Murder of Paul Cicero

6. On or about June 20, 1995, in the Southern District of New York and elsewhere, as consideration for the receipt of, and as consideration for a promise and agreement to pay, a thing of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance and maintaining and increasing his position in the Tanglewood Boys, an enterprise engaged in racketeering activity, as described above, JOHN PETRUCELLI, a/k/a "Johnny Boy," a/k/a "Fat Face," the defendant. unlawfully, intentionally and knowingly murdered Paul Cicero, in violation of New York Penal Law Section 125.25.

(Title 18, United States Code, Section 1959(a)(1).)

/s/ VICKI MAJORS
FOREPERSON

/s/ JAMES B. COMEY
JAMES B. COMEY
United States Attorney

[LETTERHEAD OF U.S. DEPARTMENT OF JUSTICE]

April 25, 2007

By Fax - (718) 590-7082
Thomas J. Sullivan, Esq.
930 Grand Concourse
Bronx, New York 10451

Re: John Petrucelli v. United States
05 Civ. 9582 (TPG)
[02 Cr. 99 (TPK)]

Dear Mr. Sullivan:

Attached is a transcript of two telephone conversations that occurred on December 18, 1997, between representatives of my office and the Westchester County district attorney's office. The discussions reflected in the transcript, as you will see, relate to information from an informant suggesting that Darin Mazzarella was involved in the murder of Louis Balancio. Mazzarella, as you probably know, was at one point charged in Westchester Country with the Balancio murder. That charge however, was dismissed by the district attorney in early 1998. Please contact me if you have any questions.

MICHAEL J. GARCIA
United States Attorney

By /s/ DAVID RASKIN
David Raskin
Assistant United States Attorney
Telephone (212) 637-2635

The following is a transcript of two telephone conversations that occurred on December 18, 1997 between Mark Pomerantz (MP), then an Assistant United States Attorney, Chief of the Criminal Division, and Jeanine Ferris Pirro (JFP), then the District Attorney of Westchester County, as well as Assistant District Attorneys Francis T. Donohue (FTD), Clement S. Patti (CSP), Steven A. Bender (SAB), and David Hebert (DH).

[Dial tone]

JFP: Mark?

MP: Hello.

JFP: Hi. Jeanine. How are you?

MP: Good. How are you?

JFP: Good. Mark, I have you on speaker because I'm here with Clem and Frank Donohue and David Hebert, as well as Steve Bender.

MP: Okay.

JFP: I just want to make sure that we're all on the same page here. That's why I'm getting involved in this.

MP: I think we are, but we should.

JFP: Well, we got a call from Kerry [Lawrence] that was kind of, you know, somewhat disturbing in terms of who said what to whom and so I said let me, let me just speak to you now. Tomorrow. And let me first say that I appreciate all your help and I appreciate your candor and, you know, everything has gone well so far.

MP: I'm glad things are tentatively working out.

JFP: (laughs) Don't say it like that. They're permanently working out.

MP: Oh, you know, there's one other thing that, ah, let me, um.

JFP: Go ahead. You want to start? Go ahead.

MP: Yeah. I mean, I wouldn't, I don't know what your plan is with regard to dismissing the case against Darren.

JFP: I don't really have a plan now, but let's talk.

MP: Well, we, we got a fragment of information that has yet to be followed up on and I'm hesitant to go into it, uh, unless, I can't tell you whether or not it's real or it's not real. Uh. If it were real and if it were reliable.

JFP: Give me a chance to respond to it. What is it?

MP: It's a witness, ah, who may have information to the effect that Darren and Nick were involved in the Balancio homicide.

JFP: Oh God.

MP: I know, it's the last thing I wanted to hear and frankly I, I, was hesitant even about raising it, but, God forbid, it turns out to be accurate after everything that's gone under the bridge.

JFP: (laughs)

MP: (laughing) It's almost comical, you know, given everything that's happened. But, but nobody connected with our case has yet talked to this person, ah, made any determination whether it's credible, real, etc, etc. So it's premature to act on it. On the other hand, while we follow up on that

lead, which will be done imminently, I didn't know what your plans were with regard to dismissing the, ah–

JFP: Let me tell you. You know, the first thing that happened was, we got a call from Kerry Lawrence and he said that he had heard that we were having a press conference and all this stuff and then when I got on the phone with him he basically said, ah, no that's not what I said. He said I just heard that you were making the arrests or that they were surrendering.

MP: Surrendering, yeah.

JFP: Which is accurate. What's happening is they're surrendering tomorrow at 8:30, between 8:30 and 9 o'clock. Now, we were just talking about how we're going to handle Darren's case and you know, not Darren, no, no, no. . .

MP: Darren, yeah.

JFP: Darren and Nick, right?

MP: Yeah, yeah.

JFP: As to our dismissal of the indictment, to somehow intimate that that was inevitable and it seemed like tomorrow given that you were gonna announce the plea to the RICO.

MP: That makes sense.

JFP: Yeah. It certainly makes sense to put it all in the mix.

MP: Is your dismissal something that happens with prejudice, without prejudice, or is it just not said?

JFP: (inaudible)

CSP: Let's put it his way. If it's dismissed, we're gonna have a hard time . . .

JFP: getting any judge. . . Tell him who you are.

CSP: Mark, it's Clem.

MP: Oh, hey, Clem.

CSP: Mark, if this is something that is rumor, that is one thing. Even if it is rumor, we have to know before tomorrow. We've got to get this information so we can assess it. No one knows the case better than Steve and I.

MP: hmm, hmm.

CSP: And, and we can't do anything. I mean I would be, I would be recommending to Jeanine not to announce an indictment against DiSimone at this point if we have another witness because that throws Darren's credibility and Nick's credibility–

MP: Clem, I realize that but I just, you know, have what I have. I, I just don't know.

CSP: Do we get more information that you have, other than a witness, anything else?

MP: I really don't have more information.

SAB: Mark, Steve Bender. How're you doing?

MP: Hi.

SAB: Mark, if this is true, then obviously Darren and Nick have violated their cooperation agreement.

MP: If it were true, you would be right.

SAB: Okay?

MP: I'm not telling you it's true. I'm not telling you it's not true. I'm telling you I heard this a half an hour ago for the first time. It came up in the context of a totally different investigation. One of my assistants was debriefing a witness on something that has nothing to do with this case. It's just totally a 180 degrees away from it. I don't even know how the name of the Mazzarellas came up. But it came up before I heard about it. It was as I say a half an hour ago when I heard about it for the first time and, ah–

JFP: Mark, what would you do if you were sitting where I'm sitting right now?

MP: What did you plan to do? Announce everything as a package?

JFP: Well, I was, was going to, and we were talking about this, suggest that there would be a dismissal but not do a dismissal yet. Isn't that where we were, guys? Because it just makes sense in the whole scheme of things, but now–

MP: I think I'd leave a little room, Jeanine, I'd say, you know, "represents a dramatic new. . ." "That these prosecutions". . . the Mazzarellas. What you're doing tomorrow "represents a significant step forward in the investigation. At the same time the investigation into the Balancio homicide is continuing." And I tell you, honestly, I don't know that I would be anxious to dismiss tomorrow or announce that

FTD: Mark, Mark. Frank Donohue. In light of what you're saying now. . .

MP: Yeah.

FTD: and the only reason we were even going forward with anything tomorrow was because there seemed to be an anxiety on the part of your office to move forward with some kind of an announcement about the plea in federal court.

MP: No, listen. I told my people we don't have to announce anything. If we get, when we can hold any press release or, even have one before today, hold everything. If we get a call from a newspaper reporter. That's something else, because their concern is, this is in effect gonna be public anyway.

CSP: Mark, I want you to know, this is Clem again.

MP: yeah.

CSP: that is, directly contradicts what Kerry told me.

MP: What'd he tell you?

CSP: Kerry told me that they, your office, did not want to be in a position where they would have to respond to the press. They wanted to make the announcement in the first instance and he told me there was talk in your office that perhaps Monday would be the outside date.

MP: Well, let me, my emails here.

FTD: And, and that's the only reason we were going forward with doing anything. And now I think in light of what you just told us, until we have an opportunity to check this thing out–

MP: Well, these guys are gonna surrender anyway, no?

FTD: Yeah.

MP: If they're gonna surrender then what's the issue? What, what we tell the press?

FTD: Yeah, exactly. Now in light of what you just said I don't think we should go into anything and commit ourselves to anything until that witness that talked to your folks can be talked to. Otherwise we'll all have egg on our face.

JFP: You know, I don't like being in a position of facing the press when I don't know what I'm doing. This doesn't look good for either one of us.

MP: I don't blame you. Hold on one second.

JFP: Okay.

MP: If I can find what I . . . You know, understand. The last thing I am doing is representing to you that there's credible evidence or anything. I just don't know the circumstances.

JFP: Mark, I understand.

MP: No agent who has knowledge of the case has spoken to this guy yet. So it's um. . .

JFP: Okay, but, you know what, Mark, I. . .

MP: I didn't want to ambush you later on.

JFP: Well, no, and I appreciate your candor right now and I would expect that and I would do the same for you. I mean, I need to have a sense of what's out there, whether it's accurate or not and try to get a sense who's pushing what and you know whether or not somebody's playing games with both of us.

MP: Okay. Here's what I emailed to Kerry because there should not be any difference of opinion about what his marching orders were. I said, "How about

we have a press release ready and issue it when we get the first inquiry from a reporter if you are inclined to respond to the District Attorney's concerns. If you're not inclined then you can tell them we don't want to delay further. You've already been accommodating and this is entirely your call" So I guess he made the call, uh, and I made my suggestion to him. I did not direct him to hold up any announcement until, um, we got a call from the press. Although I think he probably knew from my email that was my sense of it. [pause] But he has been accommodating, Jeanine, I think. He held this back for some time already. When did they plead? Like a week ago.

JFP: Yeah, last Friday.

MP: Yup.

JFP: Because what I wanted to do and you know the second part of my conversation would be to invite you and (or) MaryJo up to do this whole kit and kaboodle together.

MP: Yup.

JFP: Which I think makes the most sense you know for all of us. So I don't know now, I mean, I don't know maybe I'll. . .

CSP: Mark, it's Clem again.

MP: Yeah.

CSP: What, What's the time frame in terms of a follow up? Are we talking tonight by any chance?

MP: I'll have to find out. I don't know whether Calore was going to speak to this guy tonight or what have you.

CSP: We'll do anything. . .

SAB: Look, Mark, this is Steve Bender again, Clem and I will be happy to talk to this person.

MP: Why don't I get some more information and call you back.

JFP: Okay. We're here for awhile.

MP: You're there. Okay, yup, bye, bye.

JFP: Thank you.

MP: Bye.

JFP: Bye

[On the next part of the tape there is talking in the background and then a discussion about another matter while waiting for Pomerantz to call back.]

[dial tone]

JFP: Mark?

MP: Hello.

JFP: Hi. Hold on one second until Clem jumps in...

MP: Let me say one thing about Kerry before we go into the meat of it. He got this information during the course of the day and he brought it to my attention so we could decide what to make of it. And so don't think he was squirreling this away from you.

JFP: (laughs). No, I wouldn't (inaudible).

MP: Okay.

JFP: You know what, it doesn't matter at this point. We just have an issue to deal with.

MP: Yup.

JFP: Okay. Talk.

MP: We found, we debriefed a bureau informant within the last, ah, I think it was the last 12 hours, but certainly the last 24 hours who told us that a year and a half ago, he had a conversation with Darren Mazzarella in which Darren admitted holding down Balancio while Nick stabbed him. (Pause). Hello?

JFP: Yeah, no, we're here, we're here. Go ahead we're listening.

MP: Now I'm told this guy is reliable but I don't know anything about him yet. Our agents who have been working the Tanglewood case, Calore, etc. have not yet spoken to this guy. But I just reached an agent who was there when he was debriefed about this other matter and I'm told that, you know, he sounded credible.

JFP: All right, so, what do you want to ask him?

CSP: What, what's happening tonight, Mark? Any, any movement on reinterviewing this informant?

MP: I think they were gonna send Calore and somebody to talk to the guy. I don't know whether it's gonna happen tonight, Clem, I just don't know.

JFP: How can we find out, Mark, because we have a lot, you know, on the line, and I really don't mean to be pushy here but I gotta know how I'm gonna handle this in the morning.

MP: (exhales)

<TAPE ENDS>

[REDACTED]

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 09/17/97

On 9/17/97, Confidential Witness(CW), being knowledgeable of the interviewing agents, provided the following information:

The CW has not had contact with ANTHONY SANTORELLI, FRED SANTORELLI or any other TANGLEWOOD BOYS for the approximately nine months. He stated that FRED SANTORELLI has been straightened out and that he and the rest of the TANGLEWOOD BOYS have been laying low since te LOUIS BALANCIO homicide. FRED SANTORELLI and DARRE MAZZARELLA used to run a sports betting office together before the homicide, but this is no longer in operation.

The TANGLEWOOD BOYS all worked for FRED SANTORELLI in turn answered to ANTHONY SANTORELLI. ERIC TOFFY recently afoul of FRED SANTORELLI for being too public. VINNIE RUSSO aka 102, is currently running a small sports office and is running numbers in the Bronx and Harlem. JOHN PETROCELLI is currently wanted for the Loretta Park Homicide. The CW believe he went to California to stay with relatives, but has learned from BENEDETTO that he had returned on at least three occasions.

The CW learned from BENEDETTO and DARREN MAZZERELLA that it was NICKI MAZZARELLA who stabbed LOUIS BALANCIO.

[REDACTED]

Investigation on 09/17/97 at Undisclosed Location
[REDACTED]
SA MICHAEL J. MIZER,

by SGT. ROBERT SOTERO, NYPD

This document contains neither recommendations per conclusions at the FBI. It is the property of the FBI and is loaned to your agency.

Continuation of PD-302 of NY-29461-OC, On 09/17/97, Page 2.

[REDACTED]

Continuation of PD-302 of TIMOTHY MICHAEL OWENS, on 12/17/97 & 1/13/98, Page 3.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 05/21/2007

Source, who is not in a position to testify, provided the following information to SA WILLIAM P. READY and Assistant United States Attorney DAVID RASKIN:

Source attended a party for JOE BENEDETTO (PH) who at that time was an associate of the LUCHESE Family. BENEDETTO (PH) is a cousin to JOHN "BRODY" SORRENTINO. Also present at this party, besides BENEDETTO, were DARIN MAZZARELLA, ERIC TOFTY and an individual nicknamed "Goose".

At one point during the party, DARIN MAZZARELLA discussed his brother, NICK'S involvement in a murder. MAZZARELLA was apparently trying to protect hie brother from potential charges and the source thought that he (MAZZARELLA) was trying to get people in linc co "cover" for NICK.

Souree assumed that the murder NICK was involved in was chat of LOUIS BALANCIO because of the prior mention of a fight and the "Strike Zone" bar, in addition to DARIN'S recent release on bail from charges stemming from this homicide. However, source was not certain of this connection and would not swear to it. Source added that he/she did not hear the name "BALANCIO" mentioned/spoken at any time during the conversation.

With respect to these individuals at the party and the conversation that occurred therein, source commented that he/she was "not on the inner circle, but: on the outer fringe."

Sometime during the party or shortly thereafter, source thought that DARIN MAZZARELLA could have been "wearing a wire" because he had been released on bail.

Investiation on 05/16/207 at Undisclosed Location telephonically

File # 270A-NY-262547 (C), 281A-NY-269024 Date dictated N/A

by SA MICHAEL P. READY/TLF

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

EXCERPTS OF TRANSCRIPT

[960] MR. WHITE: But not about him.

THE COURT: This case is very heavily devoted to questions about relationships. And I repeat, we heard hours and hours of cross-examination about relationships of people who had no connection with the events, particularly, but, obviously, there was the cross-examiner, Mr. Breitbart, who was trying to explore in a very full fashion the criminal career of Mr. Defede.

When you're dealing with an organized crime family, the question of relationships is very important. There are people who do not associate at all with members of the Luchese crime family, at all, and there are others who do. And if the evidence comes in, the jury is entitled, it seems to me, to use that for whatever weight that they seek to give it for corroboration as to the testimony about the relationship of the Tanglewood Boys and indeed of the defendant with the Tanglewood Boys who were, according to the government, connected with the Luchese crime family. It's difficult in this case, certainly at this point, to say that evidence about a relationship with the Luchese crime family or members thereof is irrelevant. It's extremely relevant.

MR. WHITE: Your Honor, this is our objection. That's why we moved to strike the Luchese crime family allegations from the indictment. Now it's coming home to roust.

THE COURT: Of course, it is. It's very relevant.

[961] MR. WHITE: In 2001, his knowing these people in 2001, that's relevant—state of mind is important because it's an element of the murder in aid of racketeering, that he did it for the purpose of advancing or promoting his membership in the Tanglewood Boys.

THE COURT: I've said all I can say. I'm overruling the objection and we will recess for lunch.

MR. WHITE: Your Honor, telephone records, telephone books seized from the defendant at the time of his arrest. I don't know exactly what the government is seeking to prove by introducing this, but we can address it later. At the very least, that whole telephone book should not come in. Not everything in that telephone book could possibly be relevant.

THE COURT: What does the government seek to use it for?

MR. KELLEY: Same purpose, your Honor. It shows that some of the names in there are names of persons identified in other parts of the testimony at trial, of people who are either members of or associates of the Luchese family, or the Tanglewood Boys.

THE COURT: I'll allow that to come in.

MR. WHITE: We do object to that.

THE COURT: What does your schedule look like now?

MR. KELLEY: Judge, I expect we would be in a position to rest some time this afternoon.

[794] what position did he have with the family?

A. He was an associate. He was a son to a made man.

Q. During the time that Freddie Boy Santorelli was an associate, how often did you meet with him on a person-to-person basis?

A. I would say around four times.

Q. Prior to 1996 and the time that Freddie Boy Santorelli became inducted into the family, how many other Tanglewood Boys had you met personally?

A. Outside of Freddie Boy, one.

Q. And who was that?

A. Darin.

Q. Did there come a time when you learned that this individual named Darin had been shot?

A. Yes, your Honor.

MR. BREITBART: Objection, your Honor. Leading.

THE COURT: Overruled.

Q. When was that, sir?

A. That was in '95—sometime in '95.

Q. From whom did you learn this?

A. From Anthony Santorelli himself.

MR. BREITBART: Objection.

THE COURT: I didn't hear you.

THE WITNESS: Anthony Santorelli.

MR. BREITBART: Objection.

[795] THE COURT: Overruled.

Q. Where were you when you learned this from Anthony Santorelli?
A. I got a call from Joe Tangora, Joe Flowers, and he told me that Anthony Santorelli wanted to see me and it was very important.
Q. And did you in fact meet with him?
A. Yes, I did.
Q. Where did that meeting take place?
A. I met him in Howard Beach at the Westview Water—Waterview Diner in Howard Beach.
Q. At what time of the day did this meeting at the diner take place?
A. That was pretty close to lunchtime.
Q. Was the restaurant crowded?
A. It's a busy diner, yes.
Q. At the meeting at the diner, was anybody else present with you and Anthony Santorelli?
A. No, there wasn't.
Q. During the meeting, what did he say to you and what did you say to him?

MR. WHITE: Your Honor, we have a continuing line of objection to this inquiry.

THE COURT: Overruled.

MR. BREITBART: We may not have a continuing [796] objection?

THE COURT: You have a continuing objection, so you have your record.

MR. BREITBART: That's all that we were concerned about.

THE COURT: I just said overruled, but you have a continuing objection and it will be overruled.

MR. BREITBART: We just didn't want to interrupt after every question.

THE COURT: I understand. That is helpful.

Q. Mr. Defede, I will ask you the last question again.
At our meeting in the dinner with Anthony Santorelli, what did he say to you and what did you say to him?
A. He told me there was a shooting between a boy named Hippie and Darin. And this happened because of a verbal abuse from a boy named Steve was abused. He went over to Hippie. Hippie went down with a gun and went to the park where Darin was. Darin and Hippie were pretty good friends at that time. As a matter of fact, he had a pistol in his belt.
Q. Who had the pistol?
A. Hippie had the pistol, and the pistol was sort of falling out. And Darin says, Hey, it is going to fall out, and he trucked it back in. As the conversation continued, Darin realized that he had a problem. He started to worry and Santorelli says, I'm going to the car, and he left something in [797] his car. As he turned around, about to turn around or turned around, he was being shot. Then he told me that a cousin of one of them, which I don't recall which cousin it was, was stabbed, and Fat Face was making himself scarce.
Q. Let me ask you a couple of questions about what Anthony Santorelli told you. What did he tell you about this individual named Hippie?

Hippe was an associate of the Genovese family.
Q. You mentioned that the victim of the stabbing was a cousin of somebody?
A. Of somebody.
Q. Did Anthony Santorelli give you any idea of who he might be a cousin of?
A. He mentioned it, and it just skipped my mind. I don't recall. I figured it had to be the one that—

MR. BREITBART: Objection, your Honor.

THE COURT: Sustained.

Q. Sir, when Anthony Santorelli told you that an individual named Fat Face had made himself scarce, did you know who he was referring to when he used that name?
A. No.
Q. Did you ask him to identify?
A. No. It was starting to get crowded and I didn't want to go into this conversation. I didn't think that the conversation was running that bad, and there were people coming into the **[798]** diner.
Q. Was Anthony Santorelli required to give you this information?
A. Yes: He realized that there was going to be a sitdown on this.
Q. You used the words "sitdown," what do you mean?
A. A discussion over what happened to the participants.
Q. What was Anthony Santorelli's position in the family at the time that he told you this?
A. He was a made man.
Q. What was your understanding of why it was Anthony Santorelli who was telling you this information?

A. Well, I felt that he was in charge of the Tanglewood Boys at that time.
Q. Did you give Anthony Santorelli any instruction during the course of this conversation?
A. No, I didn't.
Q. Sir, did there come a time when you received a telephone call from Steve Crea, Sr. regarding these incidents?
A. Yes. A couple days later, he told me the Genovese people wanted to see me during the week, and I didn't know what it was about.
Q. Now, when you said "Genovese people," are you referring to members of the Genovese crime family?
A. Yes, I am.
[799] Q. Thereafter, did you in fact have a meeting with members of the Genovese crime family?
A. Yes. Before that there, I called Joe Tangora to let Anthony Santorelli meet me in Manhattan because, if there wasn't any question that I couldn't answer, I figured he knew everything about what happened.
Q. When you say "he"?
A. Anthony Santorelli.
Q. Where did this meeting with the Genovese family members take place?
A. It was on Lexington Avenue in the 50s. I don't recall what street it was at that time.
Q. Was it indoors or outdoors?
A. It was outdoors.
Q. What do you remember about the location of the meeting?
A. There was steps there that looked like some kind of a church or a synagogue. I don't recall.

Q. Who accompanied you to the meeting from the Luchese crime family?
A. It was Steve Crea and Anthony Santorelli.
Q. Who participated in the meeting from the Genovese crime family?
A. Barney Bollomo and Jimmy Ida and Ralph Coppola.

THE COURT: Who was for the Genovese family again?

THE WITNESS: The Genovese was Barney Bollomo and **[800]** Jimmy Ida.

Q. And, sir, was there a third member of the Genovese family there?
A. Yes. Ralph Coppola was across the street observing if there was any law enforcement around.

MR. BREITBART: Objection to what someone else was doing or thinking.

THE COURT: Objection denied.

Q. Mr. Oefede, had you met Barney Bollomo and Jimmy Ida before?
A. Yes, I did. I knew Jimmy Ida for over 30 years.
Q. At the time of this meeting, what were their positions in the Genovese crime family?
A. Barney Bollomo was acting boss and Jimmy Ida was consigliere.
Q. Had you met Ralph Coppola before?
A. Yes, I did.
Q. What was his position?
A. He was capo or captain.
Q. Now, when you met the Genovese family members, tell us what happened.

A. Well, Barney asked me to take a walk with him. We had a walk-talk, what we call a walk-talk.
Q. Describe to us what a walk-talk is.
A. Well, a walk-talk, we feel that law enforcement, it will be **[801]** hard to hear us, our conversation.
Q. Is that because you are walking outside?
A. Exactly.
Q. How long did this walk-talk with Barney Bollomo last for?
A. About 15 to 20 minutes.
Q. During that walk-talk, what did he say to you and what did you say to him?
A. Well, he was talking about the shooting, especially he tried to intimidate me by saying that he had every right to shoot Darin because of the argument. And I wouldn't go for that. He tried to adjust, you know, that the shooting, Hippie coming down with a pistol to the park and shooting Darin, and I just wouldn't go for it.
Q. What did you say to him?
A. I told him no. I told him that it is not, you know, it is not feasible. He shouldn't have did it. And he turned around and he was concerned, and he wanted me to guarantee that I would talk to the Tanglewood Boys, and not cause any more problems. I didn't know any of the Tanglewood Boys. I said I could speak for one, Freddie Boy Santorelli.

THE COURT: I didn't understand. You said that you would do what?

THE WITNESS: I would only speak for one boy and that was Freddie Boy Santorelli. I could guarantee him.

Q. What was Barney Bollomo's concern?
[802] A. My belief was, his concern was—

MR. BREITBART: Objection as to what his belief was.

MR. RASKIN: I will rephrase the question, your Honor.

Q. What did Barney Bollomo say to you with respect to the aftermath of the shooting?
A. There was enough bloodshed.
Q. What did you understand him to mean when he used that term?
A. The boy that was stabbed and died.
Q. Now, you also talked about a certain guarantee. that you could make. Could you explain what you mean by "guarantee"?
A. Well, I would guarantee that Freddie Boy wouldn't do any attacking on Hippie or anybody else.
Q. And was Barney Bollomo satisfied with that response?
A. Yes, he was. He was a little upset about it, but after a while he settled down to it.
Q. For what reason did you believe. you would be able to guarantee Freddie Boy Santorelli?
A. Well, I didn't tell Barney this, but I told Freddie Boy that it was my stomach that was on the line, my reputation was on the line and for me to him, he had a little responsibility there too, but I didn't tell anything like that to Barney.
Q. At the time that you had this meeting with Barney Bollomo, Freddie Boy Santorelli– what was Santorelli's position in the family?
A. He was on a list to be made.

[803] Q. After your meeting with Barney Bollomo, did you have a meeting with Freddie Boy Santorelli?
A. Yes, I did. It was a day after this meeting—a day after or a day or two later, I'm sorry. I grabbed Freddie Boy at the Waterview Diner again and I explained to him again.
Q. What did you explain to him?
A. I told him that there is nothing that could be done, that an associate of ours killed the son, a boy.

MR. BREITBART: Objection.

THE COURT: I couldn't understand that answer. Could the reporter read it back.

(Record read)

THE COURT: Go ahead.

Q. What else did you tell Freddie Boy Santorelli in your meeting with him?
A. That was about the main subject that was out there. There was nothing to be done.
Q. Did you explain to him the reason why no further action could be taken?
A. Yes. Like I said—

MR. BREITBART: Objection, your Honor. Asked and answered.

THE COURT: Overruled.

A. —he was a member of the Luchese stabbed a young boy of 16 years old.

[804] THE COURT: Could the reporter read back the answer.

(Record read)

Q. Mr. Defede, did you also have a discussion with Freddie Boy Santorelli about who was right and who was wrong in this situation?
A. Yes. At the beginning we were right because of Hippie bringing down a pistol to the park and shot Darin, but we turned wrong when the stabbing was done.
Q. And when you used the word "we"—
A. The Lucheses.
Q. Wait—
A. I'm sorry. It was the Lucheses, and it was a young boy that was a cousin at 16 years old that died.
Q. Explain what you mean when you told Freddie Boy that, in the beginning, the Luchese family was right.
A. Again, they were right because Hippie come down with a pistol. He came down with a pistol, and he went down and he shot Darin.
Q. As acting boss in the Luchese family, what should Hippie have done if he had a problem with the teasing of the individual—

MR. BREITBART: Objection to the form of that question. It is predicated on a set of facts not in evidence.

THE COURT: Overruled.

A. What he should have done, if it was that bad of abuse,